

## Missouri Attorney General's Opinions - 1967

Opinion	Date	Topic	Summary
<a href="#">6-67</a>	Apr 27	MUNICIPALITIES. PUBLIC SERVICE COMMISSION. WATER COMPANIES. GAS COMPANIES.	Third class city may sell water to other cities and to individuals beyond its corporate limits. Such city may not own facilities beyond its corporate limits to deliver such water. Such sales are not subject to jurisdiction of Public Service Commission. Third class city may not sell gas beyond its corporate limits. This opinion does not apply to cities having combined waterworks and sewerage systems which fall within the provisions of Section 250.190, RSMo.
14-67			Withdrawn
<a href="#">15-67</a>	Mar 23	DEVELOPMENT. FINANCE CORPORATION.	A development finance corporation formed under the provisions of Chapter 371, RSMo, may borrow money from any number of persons including members at the same time. Money borrowed from nonmembers may be secured as provided by Section 371.130 (4), RSMo Supp. 1965, in any priority.
<a href="#">17-67</a>	Jan 24	AID TO BLIND. DEPARTMENT OF PUBLIC HEALTH AND WELFARE.	State Welfare Department is required to prepare public assistance budget of income and expenses in determining need for aid to the blind.
<a href="#">21-67</a>	Nov 2	MOTOR VEHICLE REGISTRATION. LICENSES. DEPARTMENT OF REVENUE.	Subsection 1 of Section 301, RSMo 1959, prohibits any person from transferring his license plate to another person except for a period of fifteen days following the sale of a motor vehicle.
<a href="#">23-67</a>	May 31	NOTARY PUBLIC. NOTARIAL SEAL. SECRETARY OF STATE.	It is therefore the opinion of this office that the seal of a notary public may be imprinted directly upon the document or the impression may be affixed to the document. Either application is valid if the said seal bears the inscribed information required by Section 486.040, RSMo 1959. Any administrative rule or practice to the contrary appears to be in conflict with the above stated authorities.
<a href="#">30-67</a>	Mar 23	FIRE DISTRICTS. COUNTIES. PENSIONS. CLASS ONE COUNTIES.	A provision for pensioning of salaried employees of a fire district who incur non-service connected disabilities requiring their retirement from service of the fire department is within the authority of the board of directors of a class one county fire district.
<a href="#">31-67</a>	June 8	LEASED PROPERTY. LEASES.	Property leased by an individual or private business to the United States, the state, city, county or a political subdivision of the state,

		PROPERTY ASSESSMENT. PROPERTY TAX. PROPERTY TAX EXEMPTION. TAXATION – EXEMPTIONS.	under a lease-purchase or rental-purchase agreement, for a consideration, is not owned by such governmental unit and is not exempt from taxation under Section 137.100, RSMo 1959, prior to the time the option to purchase is irrevocably exercised. Property leased by an individual or private business for a consideration under a rental-purchase or lease-purchase agreement to an organization to be used for religious worship, for schools or colleges or for charitable purposes, is not exempt from taxation under Section 137.100, RSMo, prior to the exercise of the purchase option because the property is not being used exclusively for such purposes.
<a href="#">35-67</a>	Mar 7	PERSONAL PROPERTY. STATUTORY CONSTRUCTION. STEAM. TAXATION. SALES-USE TAX.	Sales tax may not be assessed upon the sale of steam used for heating purposes.
<a href="#">37-67</a>	Feb 2	GRAIN WAREHOUSE FUND. GENERAL REVENUE FUND. AGRICULTURE.	Fees for services rendered under Grain Warehouse Law shall be set by Commissioner of Agriculture to produce sufficient revenues to meet the expenses of administering the law.
<a href="#">39-67</a>	Mar 14		Opinion letter to the Honorable C. P. Lehen
<a href="#">41-67</a>	Aug 3	DRIVERS LICENSES. DRIVERS LICENSE REVOCATION. DRIVING WHILE INTOXICATED. MOTOR VEHICLES.	1. Commission of another offense incident to driving while intoxicated is not necessary in order to convict an individual for the offense of “driving while intoxicated.” 2. An individual arrested for “driving while intoxicated” may have his license revoked for refusing to submit to a breath test, whether the arrest involved another offense incident to driving while intoxicated or not.
42-67			Withdrawn
<a href="#">43-67</a>	Jan 17	PARKS. COUNTIES. THIRD CLASS COUNTIES. MUNICIPAL PARKS.	The City of Sedalia cannot undertake to construct a park four miles outside its corporate limits.
<a href="#">44-67</a>	Apr 20		Opinion letter to Mr. Robert L. Hyder
45-67			Withdrawn
<a href="#">46-67</a>	Mar 7	NATIONAL FOREST	Money received from the National Forest Reserves under Chapter 12,



		RESERVE FUNDS. TEACHER'S FUND. SCHOOL DISTRICTS. TAXATION – SCHOOLS. COUNTIES.	RSMo, and distributed to the various counties for the use of school districts shall under Section 165.011, RSMo Supp. 1965, be placed to the credit of the teacher's fund.
47-67			Withdrawn
<a href="#">50-67</a>	June 18	INSURANCE.	Scheme for recovery of medical and hospital expenses through voluntary contributions constitutes engaging in insurance business.
<a href="#">51-67</a>	Feb 21		Opinion letter to the Honorable William H. Bruce, Jr.
<a href="#">54-67</a>	Feb 6		Opinion letter to Mr. James L. Paul
<a href="#">55-67</a>	Apr 19		Opinion letter to the Honorable Melvin D. Benitz
<a href="#">56-67</a>	Mar 7	NEWSPAPERS. TOWNSHIPS. TOWNSHIP ORGANIZATIONS. COUNTIES. PUBLICATION. LEGAL PUBLICATION.	Periodicals which do not have a paid circulation do not qualify as newspapers under Sections 231.280, RSMo 1959, which provides for publication in a newspaper of the township financial statement and inventory of township property.
<a href="#">58-67</a>	July 6	OLD AGE ASSISTANCE – PAYABLE TO. INMATE OF COUNTY NURSING HOME. COUNTY NURSING HOME. NON-PROFIT CORPORATING, OPERATING COUNTY. NURSING HOME – WHEN.	Patient in county nursing home established under Section 205.375 RSMo 1959 which is a public medical institution, under Section 208.010 RSMo 1959 may receive old age assistance payment if otherwise eligible. Division of Welfare has discretion to pay old age assistance to recipient-patient in county nursing home as it determines proper, or directly to county nursing home it has classified as medical institution.
<a href="#">60-67</a>	Sept 21	SCHOOLS. COUNTY SUPERINTENDENT. SCHOOL DISTRICTS. COOPERATIVE AGREEMENTS.	1) A county superintendent does not have authority under Section 167.121, RSMo Supp. 1965, to assign a pupil from a district in the State of Missouri to attend a school district of another state. 2) The board of education of a Missouri public school district may contract with the school district and officials in another state for the providing of instructional services to pupils resident of the Missouri district where the schools of the other state are more accessible to the pupil so long as the contract does not delegate or surrender governmental functions and duties which are inherently vested in the Missouri public school board.

<a href="#">62-67</a>	June 1	SECOND CLASS COUNTIES. COUNTY COURT. COUNTY PROPERTY. INSURANCE. BIDDING.	The County Court of a second class county must comply with Section 50.660, RSMo 1959, and submit all contracts involving expenditures of \$500.00 or more for insurance on county property to the lowest and best bidder after due opportunity for competition.
<a href="#">65-67</a>	Jan 20		Opinion letter to the Honorable Thomas D. Graham
66-67			Withdrawn
<a href="#">68-67</a>	Apr 25	NEPOTISM. PUBLIC OFFICERS. SCHOOLS.	School Board Member who votes to employ relative violates constitutional nepotism provision. Violator forfeits his office.
<a href="#">69-67</a>	Sept 7	CRIMINAL LAW. RECKLESS OR NEGLIGENT. OPERATION OF MOTOR BOAT. A CRIME – WHEN.	If one is charged with operating motor boat in reckless or negligent manner so as to endanger life or property of any person, by permitting one to ride on bow, while boat is operated; no criminal violation of Section 306.110 (1) RSMo 1959, would be alleged. In addition to such allegations, other facts must be given, specifically showing how motor boat was operated in reckless and negligent manner within meaning of said section, to sufficiently charge defendant with violation of same.
<a href="#">70-67</a>	May 23		Opinion letter to the Honorable Lawrence O. Davis
<a href="#">77-67</a>	July 25	OPTOMETRY. PHYSICIANS. GLASSES.	Prescription glasses may be sold or dispensed to the individual who will wear the glasses or anyone of his choosing, and wholesale optical suppliers or manufacturers are not required to furnish such glasses pursuant to an individual prescription only to licensed optometrists and physicians.  Preparing a prescription for corrective glasses constitutes the practice of optometry as defined in Section 336.010, RSMo, and such a prescription may not be altered or changed in any manner that would affect the corrective properties of the lens by anyone other than a licensed optometrist or physician.
<a href="#">78-67</a>	Mar 16	ROAD DISTRICTS. COUNTIES. COUNTY COURTS. ROADS.	It is illegal for a special road district to repair or improve any private roads even though the cost is paid for by the owner.
<a href="#">82-67</a>	Jan 31	NINE-HOUR LAW. MISSOURI FAIR EMPLOYMENT PRACTICES ACT. WOMEN EMPLOYEES.	The Missouri Fair Employment Practices Act does not negate nor supplant the Nine-hour Law and related statutes.
<a href="#">83-67</a>	Mar 29		Opinion letter to the Honorable Lem T. Jones, Jr.

<a href="#">84-67</a>	Feb 21		Opinion letter to the Honorable Fielding Potashnick
<a href="#">85-67</a>	Mar 30		Opinion letter to the Honorable Dexter D. Davis
<a href="#">86-67</a>	Aug 9		Opinion letter to the Honorable Charles H. Baker
<a href="#">89-67</a>	Feb 14	OFFICERS. CONSTITUTIONAL LAW.	By virtue of Article XIV, Section 9, Missouri Constitution, it is unlawful for a person to hold the position of member or alternate member of a County Agricultural Stabilization Committee Board and at the same time hold the office of collector, trustee or assessor of a township in this state.
92-67			Withdrawn
<a href="#">95-67</a>	June 6	CHAUFFEUR LICENSE. COMMERCIAL VEHICLES. DRIVERS LICENSE. MOTOR VEHICLES. MOTOR VEHICLE LICENSE.	A van-type vehicle designed to accommodate eight people and regularly used as a courtesy car by motels to transport not more than eight guests to and from the airport is not a "commercial vehicle" as defined in Section 301.010 (1) RSMo 1959, and is not required to be licensed as such. An employee of a motel which regularly uses these vehicles for such purpose is acting as a chauffeur as defined in the second classification of Section 302.010 (3) RSMo Supp., 1965, and may be prosecuted for a misdemeanor if he so operates such a vehicle without possessing a valid chauffeur's license.
<a href="#">97-67</a>	Nov 24	JUNIOR COLLEGE DISTRICTS. ANNEXATIONS. SCHOOL DISTRICTS.	When the boundaries of a public school district which is a component of a junior college district are changed then the boundaries of the junior college district are also changed automatically to coincide with the new boundaries of the component school districts.
98-67			Withdrawn
<a href="#">100-67</a>	Feb 7	LIQUOR.	Liquor that has been consumed does not come within the meaning of the word "possession" as used in Sections 311.325, RSMo 1959, and 312.407, RSMo Supp. 1965.
<a href="#">101-67</a>	July 11	CORONER'S FEES.	A coroner of a fourth class county, being himself, a physician or surgeon, is not entitled to a twenty-five dollar fee (\$25) in conducting a post-mortem examination in addition to compensation in the form of salary as provided by law.
<a href="#">102-67</a>	Mar 20		Opinion letter to the Honorable C. M. Bassman
<a href="#">103-67</a>	Feb 14	COUNTY BOARDS OF EDUCATION. SCHOOLS. SCHOOL DISTRICTS.	Where only one school district would be under the jurisdiction of a county board of education, the board of education of that school district should serve as the county board of education as provided by Section 162.113, RSMo Supp. 1965.
<a href="#">104-67</a>	Feb 7	HOUSE OF REPRESENTATIVES. REPRESENTATIVE	A representative in the 1967 Legislature (74th General Assembly) is qualified under Article III, Section 4 of the Constitution to represent a district any part of which is within the county in which the

		DISTRICTS REAPPORTIONMENT. RESIDENCE.	representative resides.
<a href="#">105-67</a>	Mar 16	TAXATION. INTANGIBLE TAX. SAVINGS AND LOAN ASSOCIATIONS.	Dividends received from both in-state and out-of- state savings and loan associations are not subject to Chapter 146, RSMo, the Missouri Intangible Tax Law.
<a href="#">106-67</a>	Mar 23		Opinion letter to the Honorable Dexter D. Davis
107-67			Withdrawn
<a href="#">109-67</a>	Apr 25	POLITICAL SUBDIVISIONS. PUBLIC WATER SUPPLY DISTRICTS. TAXATION. TAXATION– EXEMPTIONS. TAXATION–SALES TAX.	A public water supply district organized under the provisions of Chapter 247, RSMo 1959, is a “political subdivision” within the meaning of that term as used in Section 39 (10), Article III, Constitution of Missouri 1945, and such districts are not subject to sales or use tax for the purchase of materials or equipment made directly by the district out of its funds to be owned exclusively by and for the exclusive use of the district.
<a href="#">111-67</a>	Jan 24		Opinion letter to the Honorable Thomas A. Walsh
<a href="#">112-67</a>	May 9		Opinion letter to the Honorable William J. Esely
<a href="#">113-67</a>	Apr 25	COUNTY HOSPITALS. BOARD OF TRUSTEES. BUDGET.	A county hospital established under the provisions contained in Sections 205.160 to 205.340 RSMo 1959 is governed by the requirements of Section 50.540, RSMo Cum. Supp., 1965, to the extent that the hospital board must submit its budget to the budget officer, but that said budget is not subject to revision as provided in Section 50.610 RSMo Supp., 1965.
<a href="#">115-67</a>	July 3	REAL PROPERTY. SCHOOLS. TAXATION. TAXATION– EXEMPTIONS. TAXATION– PROPERTY.	Facilities owned by schools and colleges, used exclusively as residences for students and/or faculty of the school, are exempt from property taxes by Section 137.100, RSMo if this use is primarily for educational purposes and not only as housing facilities for the convenience and benefit of the students or faculty residing therein. The determination of what constitutes the primary use rests upon the facts of each individual case.
118-67			Withdrawn
<a href="#">119-67</a>	Mar 30	RELIGIOUS ORGANIZATIONS. TAXATION. TAXATION– EXEMPTIONS.	Purchases of construction materials by a religious organization to be turned over to a contractor for use in building a church are purchases made in the conduct of regular religious functions and activities of the organization and are exempt from sales and use taxes under Section 144.040, RSMo 1959.

		TAXATION–SALES AND USE TAXES.	
<a href="#">120-67</a>	Jan 9	FEDERAL GRANTS. COMMISSION ON HIGHER EDUCATION.	Missouri Commission on Higher Education is empowered and authorized to receive and utilize federal grants under the Federal Higher Education Facilities Comprehensive Planning Grants Program.
<a href="#">121-67</a>	Mar 6		Opinion letter to the Honorable Kenneth J. Rothman
<a href="#">123-67</a>	Jan 13		Opinion letter to the Honorable William R. Clark
<a href="#">124-67</a>	May 2	COUNTY TREASURER. DEPUTIES. ASSISTANTS. COUNTY COURT. SECOND CLASS COUNTIES.	A county treasurer of a second class county must submit his deputy and assistant appointments to the county court pursuant to Section 54.230, RSMo 1959.
<a href="#">125-67</a>	Feb 2	PROSECUTING ATTORNEYS.	Only one assistant prosecuting attorney may be appointed in third and fourth class counties.
<a href="#">127-67</a>	May 9	DEPARTMENT OF REVENUE. RECORDS. STATE RECORDS COMMISSION.	The disposition of state records, regardless of pre-existing laws, is now governed by rules and regulations promulgated by the State Records Commission pursuant to Section 109.310, RSMo Supp. 1965, after the effective date of the adoption of such rules and regulations.
<a href="#">128-67</a>	May 31	COUNTY HOSPITAL. MAINTENANCE FUND. MAINTENANCE FUND–BALANCE. COUNTY COURT CANNOT TRANSFER.	County hospital trustees have exclusive control and expenditure of all money collected to credit of county hospital fund under Section 205.190, RSMo Cum. Supp. 1965, including taxes levied for hospital maintenance, under Section 205.200, RSMo Cum. Supp. 1965. Tax levy under said section may be used for maintenance, improvement, construction and furnishing necessary hospital additions. Said tax proceeds shall be used for purpose for which tax levied and none other. County court is unauthorized to transfer unused balance of hospital maintenance fund to county road and bridge fund or to county revenue fund.
<a href="#">131-67</a>	Mar 30	SCHOOL DIRECTORS. JURY SERVICE.	Members of the Board of Education of six-director school districts are not excused from jury service by the provisions of Section 494.031(7), RSMo 1959.
<a href="#">133-67</a>	May 18	STATE EMPLOYEES’ RETIREMENT SYSTEM. LEGISLATURE. RETIREMENT. RESIGNATION.	A member of the legislature who has served six or more years as a member of the General Assembly and who meets the conditions for retirement at or after normal retirement age is entitled to receive credit in calculating his retirement annuity for having served in a biennial assembly from which he has resigned.
134-67			Withdrawn

<a href="#">136-67</a>	Mar 23	VOTERS.	Doctrine of “one-man, one-vote” does not apply to positions that are appointed.
138-67			Withdrawn
<a href="#">139-67</a>	Feb 21	COUNTY SCHOOL SUPERINTENDENT. VOTER REGISTRATION. SCHOOL DISTRICTS.	County voter registration under Chapter 114, RSMo, does not apply to voters living outside Springfield voting for county superintendent of schools or the school election.
<a href="#">141-67</a>	June 16	CITY LIBRARY. COUNTY LIBRARY. LIBRARIES. CO-OPERATIVE AGREEMENTS.	(1) The Mexico City Library and the Audrain County Library District are authorized to expend funds to remodel a building for the use of both (2) That the building may be owned by the two as tenants in common and (3) That the two may enter into a cooperative agreement respecting the rights and obligations of both.
<a href="#">142-67</a>	Feb 21	MAGISTRATES. MAGISTRATE COURTS. EMPLOYEES. COMPENSATION. COUNTIES. COUNTY COURTS.	Pursuant to Section 483.485, RSMo Cum. Supp. 1965, a county court determines the need for additional employees of a magistrate court and also determines the amount of salary to be paid from the county funds.
<a href="#">143-67</a>	July 20		Opinion letter to the Honorable Bill D. Burlison
144-67			Withdrawn
<a href="#">146-67</a>	Aug 1		Opinion letter to the Honorable Jewell Kennedy
<a href="#">149-67</a>	Mar 14	CONFLICT OF INTEREST. AGRICULTURE. JOHNSON GRASS LAW. COUNTY WEED CONTROL BOARD.	The employment by the Platte County Weed Control Board of one of its members to perform services for the Board is against public policy and therefore unlawful.
<a href="#">150-67</a>	Mar 20		Opinion letter to the Honorable Albert F. Turner
<a href="#">151-67</a>	Oct 24	ABSENTEE BALLOTS. REGISTRATION. ELECTIONS.	Applications made by mail for absentee ballots may be made signed either by the person’s signature or his mark if properly authenticated. If not authenticated, the Board of Election Commissioners should investigate to determine the validity of the application. If the application is made in person, by the voter, it may be executed, either by the voter’s signature or his mark.
152-67			Withdrawn

<a href="#">155-67</a>	July 6	COUNTY HIGHWAY ENGINEER. COUNTY SURVEYOR. COUNTY COURTS. COUNTY PLANNING COMMISSION.	In a county in which there is no county highway engineer the county planning commission may nonetheless function.
<a href="#">158-67</a>	Aug 22	SCHOOLS. RELIGION. SCHOOL BUILDINGS.	A public school board may allow the use of public school property by a church college or municipality for civic, social and educational purposes that do not interfere with the prime purposes of the school property and that where there is an exchange of consideration between the public school district and the church educational institution, then there is no aid to religion.
<a href="#">159-67</a>	Mar 7	CHARTER FORM OF GOVERNMENT. CITY OF THE FOURTH CLASS. CENSUS.	A census taken by a fourth class city pursuant to Section 81.030, RSMo 1959, has the legal force and effect of a federal decennial census under Section 82.020, RSMo 1959, for the purposes of a determination of the population or number of inhabitants required for adoption of a Charter form of government under Article VI, Section 19, of the Constitution.
<a href="#">161-67</a>	June 29		Opinion letter to the Honorable Gene E. Voigts
162-67			Withdrawn
<a href="#">167-67</a>	Mar 7	COUNTY COURT. WOLF BOUNTY.	Person claiming bounty for killing wild animals must personally subscribe to oath before county clerk.
<a href="#">172-67</a>	May 24	ELECTIONS. CORRUPT PRACTICES. UNIONS. LABOR UNIONS. POLITICAL COMMITTEES. COMMITTEES.	Two or more persons whether members of labor union or not, collecting and disbursing money to be used in furtherance of election to public office of any person, constitute a political committee and treasurer must file report of expenditures in period during ninety days preceding election including primaries. Statute of limitations under Section 129.260 (3) requiring treasurer to file a statement within five days after request by five freeholders is one year.
<a href="#">174-67</a>	July 20	ROADS. BRIDGES.	Where a public road is closed or abandoned, the county would have a reasonable time to remove a bridge located on a county road. Title to the bridge does not revert to the adjoining landowners.
175-67			Withdrawn
176-67			Withdrawn
<a href="#">179-67</a>	Mar 23	CONSTITUTIONAL LAW. MOTORCYCLE. HIGHWAY PATROL.	Statute requiring operators or passengers on motorcycles to wear helmets constitutional.

<a href="#">180-67</a>	Mar 20		Opinion letter to the Honorable James A. Noland, Jr.
<a href="#">181-67</a>	Feb 23	INSURANCE.	Articles of Incorporation of American Patriot Life Insurance Company.
<a href="#">182-67</a>	Apr 11	JUVENILE COURTS. CHILDREN. COUNTY COURTS.	It is mandatory that a fourth class county pay cost of foster home care.
<a href="#">188-67</a>	Mar 9		Opinion letter to the Honorable Homer D. Wampler, III
<a href="#">189-67</a>	Mar 14		Opinion letter to the Honorable Arlie H. Meyer
<a href="#">190-67</a>	July 13	SIX DIRECTOR SCHOOL DISTRICTS. PARKS.	A six director school district is a public corporation and under Section 177.101 RSMo Supp. 1965 when applicable, certain six director school districts are authorized to establish and maintain parks within their districts.
<a href="#">193-67</a>	Oct 17		Opinion letter to the Honorable Gene McNary
<a href="#">194-67</a>	Mar 30		Opinion letter to the Honorable William R. Royster
<a href="#">195-67</a>	Mar 16	VOTERS. REGISTRATION. ELECTIONS. LEGISLATION. RACE, DESIGNATION OF.	House Bill No. 136 (74 <sup>th</sup> General Assembly), if enacted, would not invalidate presently valid registrations.
196-67			Withdrawn
<a href="#">201-67</a>	Mar 21		Opinion letter to the Honorable Don Witt
<a href="#">203-67</a>	Mar 13		Opinion letter to Mr. Herman Julien
<a href="#">206-67</a>	May 29		Opinion letter to the Honorable Clinton Almond
211-67			Withdrawn
<a href="#">212-67</a>	June 27	MOTOR VEHICLES. INTOXICATED OPERATORS. STATUTORY VIOLATION. STATUTORY VIOLATION – WHEN. CITY ORDINANCE ON.	Operation of motor vehicle over city streets, whether marked or unmarked as state highway, by one in an intoxicated condition, a violation of Section 564.440, RSMo 1959, defining and fixing punishment for operating motor vehicle by intoxicated person, regardless of fact said city had ordinance in effect at time of alleged act, prohibiting operation of motor vehicle in city while one was intoxicated and city failed to charge such person with ordinance violation.
<a href="#">213-67</a>	Oct 17		Opinion letter to Mr. Charles O'Halloran
<a href="#">215-67</a>	Oct 3	BONDS. PARKS. RECREATION.	Section 64.755, RSMo Cum. Supp. 1965, does not prohibit counties of any class from issuing bonds for park purposes even though political subdivisions in that county are presently taxing for park purposes at the



		TAXATION. COUNTIES.	rate of two mills.
219-67			Withdrawn
222-67			Withdrawn
<a href="#">223-67</a>	June 1	COSMETOLOGY.	A registered cosmetology school cannot require its students to pass a final examination before releasing the students hours, and allowing the students to take their state board examination. The right to a state license is not dependent upon the completion of any school's course but only upon having the qualifications required by Section 329.050, RSMo Supp. 1965, as determined by the state board.
<a href="#">224-67</a>	Apr 26	PARK DEPARTMENT. HIGHWAY COMMISSION. STATE HIGHWAY COMMISSION. AIRPORT. TAXATION. GAS TAX REVENUE. MOTOR FUEL TAX.	(1) The State Highway Department does not have authority to use State Highway funds for the purpose of making surveys and tests for the establishment of an airport in Lake Ozark State Park. (2) The State Highway Commission does have authority to expend State Highway funds for the purpose of relocating a highway located in a State Park caused by the location of an airport therein.
226-67			Withdrawn
<a href="#">227-67</a>	May 16		Opinion letter to the Honorable Donald L. Manford
<a href="#">228-67</a>	July 20	CHAUFFEURS. AMBULANCE. LICENSE.	An owner of an ambulance service who operates an ambulance in connection with his business of providing ambulance service for compensation is required by Section 302.020, RSMo 1959, to have a valid chauffeur's license.
<a href="#">232-67</a>	Apr 25		Opinion letter to the Honorable James Millan
<a href="#">235-67</a>	Dec 12	SCHOOLS. SCHOOL BOARD. SCHOOL TAX. SCHOOL DISTRICT. TUITION.	A school board may set a tuition rate which is not the actual per pupil cost except as expressly limited by statute. A parent may send his children to a public school in the district in which he pays a school tax. A school board does not have the right to refuse admittance to the child of a school taxpayer in that district.
<a href="#">239-67</a>	Aug 23		Opinion letter to the Honorable George W. Parker
<a href="#">243-67</a>	Nov 2	COURTS. MAGISTRATE COURT. MOTOR VEHICLES. DRIVERS LICENSE.	A non-resident defendant convicted of any charge for which Chapter 302, RSMo as amended, makes mandatory the suspension or revocation of his privilege to operate a motor vehicle in this State must surrender his license to the Court pursuant to Section 302.225, RSMo Sup. 1965 and the Court must, within ten days thereafter, forward the license, together with the record of conviction, to the Director of

			<p>Revenue.</p> <p>The Director should note on the back of the license that the privilege of the non-resident to drive a motor vehicle on the highways of this State is suspended for the required length of time or revoked and return the license as soon as possible to the licensee. The Director also should forward a certified copy of the record of conviction to the motor vehicle administrator in the state wherein the person so convicted is a resident. Section 302.150, RSMo.</p>
<a href="#">244-67</a>	July 6	PARK BOARD. AIRPORTS. PARKS.	The State Park Board has implied power and authority to construct an airport on State Park Land.
<a href="#">248-67</a>	May 10		Opinion letter to the Honorable Harry L. Porter
249-67			Withdrawn
<a href="#">251-67</a>	Sept 1	ANATOMICAL BOARD. DISPOSITION OF DEAD HUMAN BODIES. GIFTS OF HUMAN BODIES. DEAD BODIES.	Under the provisions of Section 194.190, RSMo Cum. Supp. 1965, only a person 18 years or older of sound mind may consent by writing as provided therein to donate his body or parts thereof to a named institution. A college, university, licensed hospital or the State Anatomical Board is not exempted from tort liability by Section 194.190 (6) if such institution removes or uses all or any part of a body for scientific, educational or therapeutic purposes without the written consent of the decedent except for cases where the consent of the decedent had be revoked but the institution acted in good faith without actual knowledge of the revocation.
<a href="#">254-67</a>	Aug 10	CIRCUIT JUDGES. COURT REPORTERS. TRANSCRIPTS.	(1) Under Supreme Court Rule 27.26, effective September 1, 1967, post-conviction transcripts are transcripts in civil cases and when ordered by the court under provisions of Section 485.100 RSMo Supp. 1965, the cost of such transcripts shall be paid for by the county, providing the appeal is duly perfected. (2). Unless the circuit court orders the transcript for an indigent under provisions of Section 485.100 the court reporter must furnish the transcript without fee as an officer of the court.
<a href="#">256-67</a>	Oct 30		Opinion letter to the Honorable Daniel R. Ferry
<a href="#">259-67</a>	June 15	CONFLICT OF INTEREST. OFFICERS. COUNTY OFFICERS. COUNTY JUDGE. COUNTY TREASURER. SCHOOLS.	County treasurer and county judge may serve as director of six-director school district.
<a href="#">261-67</a>	July 6	NEPOTISM.	The relationship between the Mayor of a third class city and an

		PUBLIC OFFICERS. AFFINITY. CONSTITUTIONAL LAW.	employee who is the husband of the Mayor's sister, is a relation within the fourth degree, by affinity, within the meaning of Article VII, Section 6, Missouri Constitution 1945 and hence this appointment violates Article VII, Section 6, Constitution of Missouri 1945.
<a href="#">264-67</a>	May 23		Opinion letter to the Honorable Raymond Howard
<a href="#">265-67</a>	Oct 19	ARREST.	Policeman of third class cities outside of St. Louis County do not have authority to make ordinance violation arrests in hot pursuit beyond city limits.
<a href="#">266-67</a>	Oct 30		Opinion letter to the Honorable Melvin D. Benitz
269-67			Withdrawn
<a href="#">272-67</a>	May 12	TAXATION. COUNTY COURT. EXEMPTIONS FROM TAXES.	Opinion letter to the State Board of Education
<a href="#">273-67</a>	May 5		Opinion letter to the State Board of Education
<a href="#">274-67</a>	Nov 7		Opinion letter to the Honorable Jack K. Smith
<a href="#">278-67</a>	May 23		Opinion letter to the Honorable Jasper M. Brancato
279-67			Withdrawn
<a href="#">280-67</a>	Dec 12	STATE HIGHWAY PATROL. ARREST. CITIES, TOWNS AND VILLAGES. FOURTH CLASS CITY.	State Highway Patrol is without authority to enforce municipal ordinances and a fourth class city cannot confer such authority by ordinance.
<a href="#">282-67</a>	Aug 3	COUNTY LIBRARY DISTRICT. PETITION FOR. COUNTY COURT. COUNTRY COURT – DUTIES. MANDATORY – WHEN.	If petition for establishing county library district outside all cities and towns with tax supported libraries of county, filed with county court of such county, under Section 182.010 RSMo 1959, and court finds petition to comply with section, it shall make record required by section. Court without discretion has mandatory duty of ordering election held. Court has discretion in setting date, and may order election held on next annual school election date or on special election date of petition. Cannot hold election less than forty-five days after filing of petition.
<a href="#">283-67</a>	Aug 30		Opinion letter to the Honorable Lowell McCuskey
<a href="#">285-67</a>	Oct 17	INSURANCE. CREDIT SALES. INSTALLMENT SALES.	Insurance upon the lives of installment credit account holders must be made pursuant to 408.260. Companies issuing such insurance must be authorized to do business in Missouri.

		CONSUMER CREDIT.	
<a href="#">286-67</a>	Sept 5	INSURANCE.	A corporation which agrees for a specified annual payment to reimburse or furnish, wholly or partially, to its contract holders financial responsibility bonds, bail bonds, accident-travel expenses, legal expenses, emergency road service, towing, and tire changing arising from the operation of motor vehicles is engaging in the insurance business.
<a href="#">287-67</a>	Nov 2		Opinion letter to the State Board of Education
<a href="#">289-67</a>	Aug 21		Opinion letter to the Honorable Michael Kinney
292-67			Withdrawn
<a href="#">293-67</a>	June 15	AUDITOR. COUNTIES. COUNTY COURT.	Section 50.055, RSMo 1959, and Section 29.230, RSMo Supp. 1965, are alternative methods by which the State Auditor can be requested to audit a second class county. If the request is properly made under either statute, the State Auditor must audit the county. In either event the county must pay for the cost of the audit.
<a href="#">296-67</a>	Sept 11		Opinion letter to the Honorable Gene E. Voigts
<a href="#">297-67</a>	Aug 17	JUVENILE COURT. JUVENILE OFFICERS. PROSECUTING ATTORNEYS.	Prosecuting attorney to furnish legal advice to juvenile officer but not participate in court proceedings.
<a href="#">298-67</a>	Aug 17	ADOPTION. JUVENILE COURT. NEGLECTED CHILDREN.	Juvenile Court first acquiring jurisdiction over neglected child has exclusive jurisdiction in proceedings to terminate parental control.
<a href="#">299-67</a>	Nov 21	CONSTITUTIONAL CHARTER CITIES. EASEMENTS. CONDEMNATION. ELECTRICAL POWER PLANTS.	The City of Columbia, Missouri, cannot lawfully acquire by purchase or condemnation title to property in Cooper County for the purpose of erecting and maintaining electrical power transmission lines.
<a href="#">304-67</a>	Aug 22	SOIL AND WATER CONSERVATION SUBDISTRICTS. STATE AGENCIES.	(1) Soil and water conservation subdistricts organized under the provisions of Chapter 278, RSMo, to carry out watershed protection and flood prevention purposes and to further conservation and utilization of water for additional purposes including recreation, irrigation and wildlife development, have implied power to construct dams across non-navigable streams to achieve the ends for which the subdistricts are created; (2 ) Such soil and water conservation districts are governmental agencies of the state and do not come within the purview of Chapter 236 RSMo, which requires private persons or

			corporations to obtain permission of the circuit court to build dams for mills, electric power or other machinery; (3) Any damage to the riparian rights of downstream landowners from the construction of dams by soil and water conservation subdistricts would be consequential and result from the proper exercise of the police power of the state and be damnum absque injuria.
<a href="#">307-67</a>	Aug 22		Opinion letter to the Honorable James R. Hall
<a href="#">308-67</a>	July 6	MARRIAGE. MISCEGENATION.	The statutory prohibitions against interracial marriages as set forth in Section 451.020, RSMo Supp. 1965, and Section 563.240, RSMo 1959, are unconstitutional.
<a href="#">309-67</a>	July 12	MARRIAGE. RABBIS.	Rabbis have the power and authority to solemnize marriages in this state.
<a href="#">310-67</a>	Nov 2		Opinion letter to Major General L. B. Adams, Jr.
<a href="#">311-67</a>	June 20		Opinion letter to the State Board of Education
312-67			Withdrawn
<a href="#">313-67</a>	June 21	ELEMENTARY AND SECONDARY EDUCATION ACT. STATE BOARD OF EDUCATION. FEDERAL GRANTS.	Review and certification of State Board's application for program grant to provide educational programs for migratory children of migratory agricultural workers under Title I, Public Law 89-10 as amended by Section 103, Public Law 89-750.
<a href="#">315-67</a>	Sept 28		Opinion letter to the Honorable Thomas R. Gilmore
<a href="#">316-67</a>	July 18		Opinion letter to the State Board of Education
<a href="#">317-67</a>	Dec 21	COUNTIES. COUNTY COURTS. BUILDING COMMISSION. PLUMBING INSTALLATION. SEWAGE DISPOSAL.	Counties of the first and second class may adopt building codes which include provisions for regulation of plumbing installation and sewage disposal.
<a href="#">320-67</a>	Aug 22	ELECTIONS. VOTING MACHINES. ELECTRONIC VOTING MACHINES. SECRETARY OF ELECTIONS. STICKERS.	Electronic voting systems may be used in second class counties containing part of city of more than 350,000 when ballot card placed in envelope, envelope number entered in poll books, second envelope number placed on ballot card and sticker placed on both numbers on envelope.

		BLACK STICKERS.	
<a href="#">324-67</a>	July 25	LICENSE FEES. POOL TABLES.	The annual license tax prescribed by Section 318.020, RSMo 1959, for tables described in Section 318.010, RSMo 1959, is applicable to pool tables which are not regulation size and are coin operated.
<a href="#">327-67</a>	July 20		Opinion letter to the Honorable Haskell Holman
<a href="#">328-67</a>	Aug 17	CONTEMPT. WORKMEN'S COMPENSATION. WITNESSES. VENUE.	Venue of offense of witness not appearing in Workmen's Compensation hearing is in county where witness was to appear.
<a href="#">330-67</a>	Oct 26	TAXATION. TAXATION – SALES/USE TAXES. TAXATION – REFUND.	The Director of Revenue may grant a refund of overpaid sales and use taxes as authorized by Section 144.190, RSMo 1959, only when a proper claim for said refund is filed within one year from the date of overpayment.
<a href="#">332-67</a>	Sept 1	COSMETOLOGY.	Section 329.070, RSMo 1959, requires a person to be at least seventeen years of age before that person can be an apprentice or student. The State Board of Cosmetology cannot waive this requirement.
<a href="#">333-67</a>	July 31		Opinion letter to the Honorable James C. Kirkpatrick
<a href="#">334-67</a>	July 31		Opinion letter to the Honorable James C. Kirkpatrick
<a href="#">336-67</a>	Sept 27		Opinion letter to the Honorable Donald L. Manford
<a href="#">337-67</a>	Aug 22	PUBLIC RECORDS. RECORDER OF DEEDS. MICROFILMING OF RECORDS.	The recorder of deeds has the authority and duty to determine whether instruments entitled to be recorded in his office are to be recorded by making photographic copies of such instruments which shall be bound, paged and indexed in record books pursuant to Section 59.410 RSMo 1959, or whether such instruments are to be recorded by means of microfilm or other mechanical process pursuant to Section 109.120, RSMo Cum. Supp. 1965.
<a href="#">338-67</a>	Aug 21		Opinion letter to the Honorable H. Dean Whipple
<a href="#">339-67</a>	Aug 1	LEGISLATORS. SENATORS. REPRESENTATIVES. GENERAL ASSEMBLY. LEGISLATURE. COMPENSATION.	Increase in compensation for Senators and representatives under House Bill No. 100 of the 74th General Assembly effective first day of regular session of 75th General Assembly. Increase applies to holdover Senators as of such date.
<a href="#">340-67</a>	Oct 4		Opinion letter to the Honorable James E. Godfrey
<a href="#">341-67</a>	Aug 22		Opinion letter to Mr. John Harry Wiggins

<a href="#">345-67</a>	Aug 20		Opinion letter to the Honorable Hubert Wheeler
<a href="#">346-67</a>	Aug 10	CITIES, TOWNS AND VILLAGES. ROADS AND STREETS.	A city may use funds allocated to it under provisions of Article 30(a), Constitution of Missouri, (Motor Fuel Tax) to purchase rights-of-way for street expansion.
<a href="#">347-67</a>	Oct 19	RECORDS. BOARD OF EQUALIZATION.	The records of the county boards of equalization are public records, open to public inspection during business hours, and under such reasonable rules and conditions as proper authority may require.
<a href="#">348-67</a>	Nov 2	VOTERS. REGISTRATION. ELECTIONS. LEGISLATION. RACE, DESCRIPTION OF.	House Bill No. 136, enacted by the Seventy-Fourth General Assembly, signed by the Governor on May 2, 1967, amending Section 117.330, RSMo 1959, to delete the item "White Colored" from the Affidavit of Registration, does not repeal that portion of Section 117.300 which requires the registration officer to note on the Application for Registration whether the applicant is White or Colored without inquiry where such is apparent.
<a href="#">349-67</a>	Oct 18		Opinion letter to the Honorable William R. (Bill) Royster
<a href="#">357-67</a>	Sept 21	ELECTIONS. VOTING. WAGES.	1. As used in Section 129.060, RSMo 1959, providing that no deduction shall be made from an employee's "usual salary or wages" when he absents himself from employment for a maximum of three hours on election day, the quoted words refer to an amount received on a typical working day, and cannot be construed to indicate the usual hourly rate of wages. 2. Under a union contract requiring additional compensation for hours in excess of 7 1/2 worked in one day, and where an employee has previously worked nine (9) hours a day for over a year, any employer who excuses the employee to vote on election day after he has worked 8 1/2 hours, is required to pay such employee his usual salary or wages of 7 1/2 hours straight time pay plus 1 1/2 hours of overtime pay in accordance with Section 129.060, RSMo 1959.
<a href="#">359-67</a>	Nov 9	SCHOOL BOARDS. ELECTIONS. LARGEST NUMBER OF VOTERS.	The phrases "greatest number of votes" and "largest number of votes" under House Bill No. 425, the 74th General Assembly requires candidate for director of Kansas City Public School District to receive plurality but not majority of votes cast.
360-67			Withdrawn
<a href="#">362-67</a>	Oct 3		Opinion letter to the Honorable James A. Noland
<a href="#">363-67</a>	Oct 30		Opinion letter to the Honorable Thomas O. Pickett
<a href="#">365-67</a>	Oct 26	POLITICAL SUBDIVISIONS. PUBLIC WATER SUPPLY DISTRICTS.	The 1965 Amendments to Chapter 144 do not relieve a public water district formed under the provisions of Section 247.010 et seq. RSMo 1959 from collecting sales tax from domestic, commercial or industrial consumers to whom it sells water and remitting the same to the

		TAXATION. TAXATION – EXEMPTIONS. TAXATION – SALES TAX.	Department of Revenue.
<a href="#">368-67</a>	Aug 28		Opinion letter to Mr. Herbert C. Clare
<a href="#">371-67</a>	Dec 6		Opinion letter to the Honorable John E. Downs
<a href="#">372-67</a>	Nov 17		Opinion letter to the Honorable Haskell Holman
<a href="#">373-67</a>	Oct 17	LABOR ORGANIZATION. NEGOTIATION. PUBLIC BODY. POLITICAL SUBDIVISION. CITIES. SCHOOLS AND SCHOOL DISTRICTS. COLLECTIVE BARGAINING. STATE. STATE OFFICERS. STATE BOARDS AND COMMISSIONS.	1. A city shall (used in a mandatory sense) meet with appropriate representatives of city employees when proposals relative to salaries and other conditions of employment are presented to the city. 2. When the discussions between the representatives of the city and the labor unions have been completed and the results reduced to writing, the agreement must be submitted to the governing body of the city in the form of an ordinance, resolution, bill or other form for “adoption, modification or rejection.” This procedure does not constitute “collective bargaining” in the usual understanding of such phrase because the results of the completed discussions, when reduced to writing, do not constitute a legally enforceable contract.
<a href="#">374-67</a>	Oct 17	SHERIFFS. OFFICERS. COUNTY OFFICERS. COMPENSATION. FEES. ACCOUNTABLE FEES.	Sheriffs entitled to compensation provided in Senate Bill 237 of the Seventy-fourth General Assembly during the present term of office; must pay all criminal fees into county treasury; mileage for serving criminal warrants and criminal investigation and payment for person’s meals are “reimbursable expenses”; salary provisions of Sections 57.390, 57.400, 57.403, 57.405 and Senate Bill 237 are “remunerations” within meaning of Senate Bill 237.
<a href="#">377-67</a>	Oct 3	ELECTIONS. NONPARTISAN COURT PLAN. PETITIONS. ELECTION PETITIONS.	Petition for adoption of nonpartisan court plan in 21 <sup>st</sup> judicial circuit, August 6, 1968, follows form set out in Section 1, House Bill No. 27 of the 74 <sup>th</sup> General Assembly and is sufficient.
378-67			Withdrawn
<a href="#">379-67</a>	Nov 9	COUNTIES. COUNTY COURTHOUSE. MUNICIPALITIES.	(1) The county courts have no power or authority to provide offices in the courthouse for members of the state legislature, and (2) Cities incorporated under statutes of this state have no power or authority to provide offices for the members of the state legislature.



<a href="#">381-67</a>			Withdrawn
<a href="#">387-67</a>	Sept 14	ASSESSMENT. COUNTY COLLECTOR. MOTOR VEHICLES. PERSONAL PROPERTY TAX. STATE TAX COMMISSION. TAXATION.	The State Tax Commission has no authority to equalize only a portion of any class of property established by Section 138.390, RSMo. Its report and order purporting to decrease the valuation of “Motor vehicles, trucks, airplanes, motorcycles” in St. Louis City by 50 per cent in effect subdivides the statutory class for “other tangible personal property” and establishes a new class. It is the opinion of this office that the report and order is beyond the power of the Commission and therefore, is void and without effect.
<a href="#">389-67</a>			Withdrawn
<a href="#">394-67</a>	Nov 2	ST. LOUIS HOUSING AUTHORITY. COLLECTIVE BARGAINING. POLITICAL SUBDIVISION. MUNICIPAL CORPORATION. PUBLIC BODY.	The St. Louis Housing Authority is a “public body” within the meaning of House Bill No. 166 of the Seventy-fourth General Assembly.
<a href="#">397-67</a>	Oct 24	HOUSING AUTHORITY.	Housing authorities of Missouri have the power under Sections 99.090 and 99.100, RSMo 1959, to establish fixed rents for like housing units and are not bound to establish rent as a percentage of the tenants’ income.
<a href="#">404-67</a>	Oct 19	PEACE OFFICERS. FIREARMS. WEAPONS. ALDERMAN. PUBLIC OFFICERS.	In cities of the Fourth Class an alderman may not be appointed a special police officer; and an alderman, by virtue of his office as alderman, is not empowered to carry firearms.
<a href="#">408-67</a>			Withdrawn
<a href="#">409-67</a>			Withdrawn
<a href="#">412-67</a>	Dec 19		Opinion letter to the Honorable James L. Paul
<a href="#">414-67</a>	Dec 21	COUNTY HOSPITALS. COUNTY NURSING HOMES.	An existing hospital facility may be converted into a county nursing home under the provisions of Section 205.375, RSMo., 1959 by the county court with the permission of the hospital Board of Trustees. Also the Hospital Board of Trustees have no statutory authority to continue to control and manage the facility after it has been converted into a nursing home and that the primary duty in regard to this rests in the county court under Section 205.375.
<a href="#">415-67</a>	Nov 21	SHERIFFS.	Sheriffs of third and fourth class counties may under Senate Bill 237

		OFFICERS. COUNTY OFFICERS. COMPENSATION. FEES. ACCOUNTABLE FEES.	<p>enacted by the Seventy- fourth General Assembly retain all non-accountable civil fees received by them as of October 13, 1967, even though the amounts exceed the annual limits set by Senate Bill 237. Sheriffs who have received fees up to or in excess of the limits set by Senate Bill 237 as of October 13, 1967, are not entitled to retain any civil fees received between October 13, 1967, and January 1, 1968. Sheriffs who have not received civil fees up to the limits set by Senate Bill 237 as of October 13, 1967, may retain all civil fees received after that date and up to January 1, 1968 until the limits of Senate Bill 237 are reached.</p> <p>The expenses that a sheriff of a third or fourth class county may receive under Section 548.241, RSMo 1959, are not received in his official capacity as sheriff and therefore are not subject to the provisions of Senate Bill 237.</p>
<a href="#">419-67</a>	Nov 21	ELECTIONS. PUBLIC WATER SUPPLY DISTRICT. VOTING HOURS.	No deviations from the voting hour provisions of Section 111.370, RSMo., which are adopted by Section 247.180, RSMo., applicable to public water supply districts, are authorized and that only literal compliance with those provisions constitutes legal compliance.
<a href="#">431-67</a>	Nov 17		Opinion letter to the Honorable E. J. Cantrell
<a href="#">433-67</a>	Dec 21		Opinion letter to the Honorable Donald L. Manford
<a href="#">437-67</a>	Nov 16		Opinion letter to Mr. Joseph M. Rowley
<a href="#">441-67</a>	Dec 12	SCHOOLS. BIDS. CONSTRUCTION CONTRACTS. PREVAILING WAGE LAW.	1. A school district authorizing construction of facilities which may exceed an expenditure of twenty five hundred dollars shall publicly advertise for bids on the construction; 2. After advertising for bids, the board in the exercise of sound discretion may reject any and all bids and may proceed with the construction under its own supervision and control without contracting.
<a href="#">451-67</a>	Dec 6		Opinion letter to Mr. Clyde Burch
<a href="#">453-67</a>	Dec 28	OFFICERS. ELECTION COMMISSIONERS.	Board of Election Commissioners of Jackson County not entitled to increase in salary under House Bill 398 (Section 113.690) during their present term.
<a href="#">455-67</a>	Dec 27		Opinion letter to the Honorable Robert D. Scharz

MUNICIPALITIES:  
PUBLIC SERVICE COMMISSION:  
WATER COMPANIES:  
GAS COMPANIES:

Third class city may sell water to other cities and to individuals beyond its corporate limits. Such city may not own facilities beyond its corporate limits to deliver such water.

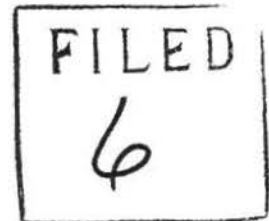
Such sales are not subject to jurisdiction of Public Service Commission. Third class city may not sell gas beyond its corporate limits. This opinion does not apply to cities having combined waterworks and sewerage systems which fall within the provisions of Section 250.190, RSMo.

OPINION NO. 6  
(AMENDED June 20, 1973)

This opinion should always be  
accompanied by Op. No. 32, 10/5/61, Garrett.

April 27, 1967

Honorable Ronald M. Belt  
State Representative  
Macon, Missouri



Dear Representative Belt:

Reference is made to your request for an official opinion from this office raising certain questions in regard to the sale of water or gas by a municipal water or gas utility owned and operated by a third class city. Inasmuch as the law applicable to municipally owned water utilities differs from the law applicable to municipally owned gas utilities, the questions raised by you have been restated for the purpose of logical treatment and disposition. The restatement of the questions, a discussion of the applicable law and conclusions by this office follow.

1. May a third class city sell water to a fourth class city or village for resale by the fourth class city or village to its inhabitants?

Authority for a third class city to own and operate a public utility for the purpose of supplying water to the inhabitants of such city is found in Sections 88.633, 91.010, 91.090 and 91.450, RSMo (All statutory references herein are to the Revised Statutes of Missouri as amended unless otherwise specified). Similar authority is conferred upon fourth class cities by Sections 88.773, 91.010, 91.090 and 91.450. Authority for villages to own and operate a public utility for the purpose of supplying water to its inhabitants is found in Sections 91.010 and 91.450. Therefore, the authority for cities of the third class, cities of the fourth class and villages to own and operate public utilities for the purpose of supplying water to the inhabitants of such municipal corporations is clearly provided for by the statutes.

Honorable Ronald M. Belt

The sale of water by cities is provided for by Section 91.050 as follows:

"Any city in this state which owns and operates a system of waterworks may, and is hereby authorized and empowered, to supply water from its waterworks to other municipal corporations for their use and the use of their inhabitants, and also to persons and private corporations for use beyond the corporate limits of such city, and to enter into contracts therefor, for such time, upon such terms and under such rules and regulations as may be agreed upon by the contracting parties."

The cited statute is applicable to the sales of water to cities of the fourth class and villages by a public utility owned and operated by a city of the third class. Such sales may be made for resale by cities of the fourth class and villages to the inhabitants of such municipal corporations.

The purchase of water by cities of the fourth class and villages is authorized by Section 91.060 as follows:

"Any city, town or village in this state having authority to maintain and operate waterworks may procure water for that purpose from any other city having a system of waterworks, and to that end may enter into a contract therefor with such city having a system of waterworks; and any city of this state having a waterworks system is hereby authorized and empowered whenever it deems it expedient to supply any other city, town or village of this state in its vicinity with water from its waterworks for such time and upon such terms and under such rules and regulations as it may deem proper."

However, it appears that the facilities for delivering the water from the city limits of the city of the third class to the corporate limits of the city of the fourth class or village must be owned and operated by the city or village being supplied. Section 91.070 authorizes a city, town or village which is being supplied with water by another city to construct the necessary facilities to conduct the water from the supplying city to the supplied city, town or village.

Honorable Ronald M. Belt

In *Taylor v. Dimmitt*, 78 S.W.2d 841, the Supreme Court held that the statutes applicable to the supply and sale of electricity by a municipally owned utility to customers beyond the corporate limits of the city do not authorize the city to construct facilities for the delivery of such electricity from the corporate limits of such city to the customer. The Court noted that a city, town or village being supplied with electricity by another city is authorized by Section 91.040 to own and operate facilities for delivering the electricity from the supplying city, town or village. The Court applied the maxim *expressio unius est exclusio alterius* and held that the supplying city had no authority to own and operate transmission facilities from its corporate limits to the supplied city, town or village.

Section 91.040, applicable to agreements between cities for a supply of electricity, is substantially identical with the provisions of Section 91.070, applicable to agreements between cities for the supply of water. By the authority of *Taylor v. Dimmitt*, supra, it must be concluded that a city supplying water to another city, town or village does not have the authority to own and operate facilities to conduct the supply of water to the city, town or village being supplied.

2. May a third class city sell water directly to a public institution (public school) in a fourth class city?

Section 91.050 authorizes a city which owns and operates a system of waterworks to supply water to other municipal corporations for use beyond the corporate limits of such city. The Supreme Court has construed school districts to be municipal corporations; *Russell v. Frank*, 154 S.W.2d 63. Therefore, a third class city may sell water directly to a public school located beyond the corporate limits of such city. However, pursuant to *Taylor v. Dimmitt*, supra, as discussed under question 1, supra, the city may not own and operate facilities for the delivery of water from its corporate limits to a public school located beyond such corporate limits.

3. May a third class city sell water directly to an individual inhabitant of a fourth class city?

Section 91.050 provides that a city which owns and operates a system of waterworks is authorized to supply water to persons for use beyond the corporate limits of such city. Similar authority is conferred by Section 91.100. In *Speas v. Kansas City*, 44 S.W.2d 108, the Supreme Court held that a provision of the charter of Kansas City permitting the city to supply water to nonresidents was not in violation of the Constitution and was lawful. In upholding the lawfulness



Honorable Ronald M. Belt

of this charter provision the Court noted with approval the provisions of Section 91.050. Therefore, it must be concluded that a third class city may sell water directly to an individual inhabitant of a fourth class city. However, it should be noted that pursuant to the authority of Taylor v. Dimmitt, supra, and the discussion thereof under question 1 above, the city may not construct facilities beyond its corporate limits for the purpose of supplying an individual with water.

4. May a third class city sell gas to a fourth class city or village for resale by the fourth class city or village to its inhabitants?

Sections 91.010 and 91.450 authorize all cities, towns and villages to own and operate public utilities for the purpose of supplying gas to the inhabitants of such cities, towns and villages. The ownership and operation of gas works by cities of the third class is further provided for by Section 88.613. Section 91.210 provides that the statutory provisions applicable to the purchase of waterworks by cities, towns and villages shall apply to the purchase of gas plants. Therefore, the authority for cities of the third class, cities of the fourth class and villages to own and operate public utilities for the purpose of supplying gas to the inhabitants of such municipal corporations is clearly provided for by the statutes.

As noted in the discussion under question 1, supra, the sale of water by cities to other cities, towns and villages is authorized by Section 91.050 and such sales are pursuant to the provisions of Sections 91.060, 91.070 and 91.080. Substantially identical statutory provisions for the sale of electricity by a city to other cities, towns and villages are found in Sections 91.020, 91.030 and 91.040. A search of the statutes fails to disclose any statutory authorization for the sale of gas by a city to other cities, towns or villages.

Taylor v. Dimmitt, discussed the powers of a municipality as follows, 78 S.W.2d 1.c. 843:

"[2,3] The issue here does not involve the supply of electricity for the lighting of the streets of a city (an essential municipal, if not governmental, function) or the supply of electricity to inhabitants of the city (essentially a municipal function), but the right of a city to erect an electric transmission line to supply electric service to nonresident consumers. Even as to governmental functions, Missouri cities have or can exercise only such powers as are conferred by express or implied provisions of law; their charters being a grant and not a limitation of power, subject to strict construction, with doubtful powers resolved against the city. 'It is a general

Honorable Ronald M. Belt

and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: (1) Those granted in express words; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." (citations)"

In finding that the city of Shelbina did not have statutory authority to construct, maintain and operate an electric transmission line for the purpose of furnishing service to consumers outside its corporate boundaries, the Court applied the maxim *expressio unius est exclusio alterius*. This maxim, together with principles enumerated in regard to the powers of a municipal corporation, leads this office to the conclusion that cities, including cities of the third class, do not have the authority to sell gas to a fourth class city or village for resale by the fourth class city or village to its inhabitants. Sections 91.020 and 91.050 are specific authority for such sales of electricity and water. No such specific authority is found in the statutes in regard to the sale of gas. Such authority is not necessarily or fairly implied in, or incident to, any express powers and such authority is not essential to the declared objects and purposes of a third class city. By specifically granting authority for the sales of electricity and water the conclusion is indicated that the Legislature intended no such authorization for the sales of gas.

In reaching this conclusion this office has taken into consideration the provisions of Section 70.220, which authorizes municipalities to contract and cooperate together for the planning, development, construction, acquisition or operation of any public improvement or facility or for a common service. This section applies only if the subject and purposes of such contract or cooperative action are within the scope of the powers of such municipality. As noted above the exclusion of authorization for the sales of gas by a municipality indicates a legislative intent to withhold such authorization. Furthermore, research by this office has not disclosed cases which would support a conclusion that the sales of gas by one city to another city, town or village is within the meaning of "public improvement" or "common service".

5. May a third class city sell gas directly to a public institution (public school) or to an individual inhabitant of a fourth class city?

Honorable Ronald M. Belt

As noted in the discussion of the first three questions in this opinion, the authority of third class cities to sell water to private individuals and to municipal corporations beyond the corporate limits of such city is found in Section 91.050. As noted in the discussion of question 4, immediately preceding, similar authority for the sales of electricity is found in Section 91.020. A search of the statutes fails to disclose any authority for cities to sell gas to persons and municipal corporations beyond the corporate limits of such city. The discussion under question 4 is equally applicable to this question and this office concludes that a third class city may not sell gas directly to a public institution (public school) or to an inhabitant of a fourth class city.

6. Are the sales of water by a third class city to a fourth class city, a public institution (public school) in a fourth class city and to an inhabitant of a fourth class city subject to the jurisdiction of the Public Service Commission?

A review of the history of the Public Service Commission Act is helpful in reaching a definitive conclusion on this question. The Act was enacted in 1913 and is found in the Laws of 1913, pages 556 through 651. Article IV of the Act contained the provisions relating to gas corporations, electrical corporations and water corporations and is found in the Laws of 1913, pages 602 through 620. The following sections of the Act, together with the titles of such sections as they appear in the Laws of 1913, are relevant to the question under consideration: Section 68. Safe and adequate service; just and reasonable charges. Section 69. General powers of Commission in respect to gas, water and electricity. Section 70. Power of Commission to stay increased rates. Section 71. Inspection of gas, water and electric meters. These sections enumerate the powers of Public Service Commission in regard to the service and rates of gas, electrical and water corporations. By the terms of each of the sections the powers of the Commission in regard to service and rates extend to "every gas corporation, every electrical corporation, every water corporation and every municipality \* \* \* ." (Emphasis added) General provisions applicable to the Public Service Commission are set fourth in Article I of the Act and Section 16 of Article I, Jurisdiction of Commission, enumerates the various utility operations which are subject to the jurisdiction, supervision, powers and duties of the Commission. Section 16 (7) of the 1913 Act is as follows:

"7. To all water corporations, and to the land, property, dams, water supplies, or power stations thereof and the operation of the same within this state."



Honorable Ronald M. Belt

This subparagraph was amended in 1917 by the addition of the following proviso, Laws of 1917, page 433:

"Provided, that nothing contained in this act shall be construed as conferring jurisdiction upon the public service commission over the service or rates of any municipally owned water plant or system in any city of this state, except where such service or rates are for water to be furnished or used beyond the corporate limits of such municipality;"

This section as amended in 1917 remains unchanged as 386.250, (7), RSMo.

Jurisdiction of the Public Service Commission over a municipally owned water system which furnishes water to customers beyond the corporate limits of such municipality is indicated by Section 386.250 (7). Such jurisdiction is also indicated by the Supreme Court in Public Service Commission v. City of Kirkwood, 4 S.W.2d 773. In the cited case the Court held that the Commission could not require a municipality to obtain a certificate of convenience and necessity to supply water to persons and private corporations beyond its corporate limits. In reaching this conclusion the Court noted that a municipality supplying water beyond its corporate limits is subject to the supervision of the Commission as to service and rates pursuant to the statutory provision which is now 386.250 (7). However, it is noted that the specific provisions of the Public Service Commission Act in regard to service and rates, viz Sections 68, 69, 70 and 71, included the service and rates for gas, electrical and water services supplied by municipalities (the substance of the referred sections appeared as Sections 5645, 5646, 5647 and 5648, RSMo 1939, and appear as Sections 393.130, 393.140, 393.150 and 393.160, RSMo 1959). Such jurisdiction by the Public Service Commission is further indicated by the Supreme Court in Speas v. Kansas City, 44 S.W.2d 108. In the cited case certain taxpayers in the City of Kansas City complained, among other things, that the city was supplying water to nonresidents with the result of an inadequate supply of water for the use of residents. The Court held that complaints of this character must first be heard by the Public Service Commission and referred specifically to the provisions of what is now Section 386.250 (7).

However, in City of Columbia v. State Public Service Commission, 43 S.W.2d 813, the Court construed Section 69 of the Public Service Commission Act (Section 5646, RSMo, 1939, Section 393.140, RSMo 1959). In the cited case residents of the City of Columbia had filed a complaint with the Public Service Commission alleging that rates charged

Honorable Ronald M. Belt

by the City of Columbia for electric service were unfair. The Court held that the statutory authorizations for the Public Service Commission to regulate the rates and service of a municipally owned electric light plant were unconstitutional because the title of the Act was insufficient to include the subject of municipally owned electric plants. It is noted that the sections of the Act in regard to the regulation of municipally owned electric plants are the same sections of the Act concerning the regulation of municipally owned water systems. The Court has commented upon *City of Columbia v. State Public Service Commission*, supra, to the effect that municipally owned public utilities do not come within the regulation of the Public Service Commission Act; *State ex rel. Union Electric Light & Power Co. v. Public Service Commission*, 62 S.W.2d 742, 1.c. 745, and *State ex rel. City of Sikeston v. Public Service Commission*, 82 S.W.2d 105, 1.c. 110.

As noted above, *Speas v. Kansas City*, supra, indicates that the Public Service Commission has jurisdiction over service rendered to nonresidents by a municipally owned water system. The *Speas* case was pending decision in Division 2 of the Supreme Court at the same time that the *City of Columbia* case was pending decision in Division 1 of the Supreme Court. The decision in the *Speas* case was rendered on October 1, 1931, and a Motion for Rehearing was overruled on December 1, 1931. The decision in the *City of Columbia* case was rendered on November 20, 1931, and no Motion for Rehearing was filed. Therefore, authority for supervision by the Public Service Commission over a municipality supplying water beyond its corporate limits as indicated by the *Speas* case is rendered doubtful by the *City of Columbia* case.

Although the *City of Columbia* case was decided in 1931, the specific regulatory provisions of Sections 68, 69, 70 and 71 of the Public Service Commission Act in regard to jurisdiction by the Commission over service and rates of municipally owned gas, electric and water systems remained in the Revised Statutes of 1939 as Sections 5645, 5646, 5647 and 5648. The 65th General Assembly revised the Missouri statutes in 1949. House Bill 2165 repealed Sections 5645, 5646, 5647 and 5648, RSMo 1939, and reenacted these sections eliminating therefrom regulatory jurisdiction over the service and rates of municipally owned gas, electric and water systems. (See Report on Revision of Statutes, 1949, Volume III, Errata to Appendix to Report No. 11, p. 5). Section 5646 (7), RSMo 1939, related to municipally owned gas, electric and water systems only, and this paragraph was eliminated from the reenacted section. Section 5661, RSMo 1939 (now Section 386.360), relating to action by the Commission to enforce the law or its orders, was amended by House Bill 2099 in 1949 by eliminating therefrom municipalities as one of the entities against which the Commission was authorized to take action to enforce the law or its orders. (See Report on Revision of Statutes, 1949, Volume III, Errata to Appendix to Report No. 11, p. 5).

Therefore, it appears that the Statutory Revision Session of the General Assembly in 1949 attempted to make necessary amendments to conform the Public Service Commission statutes to the opinion of the Court in *City of Columbia v. State Public Service Commission*, supra. It also seems clear that no specific statutory authorization over the service and rates of municipally owned gas, electric and water systems remained in the Public Service Commission subsequent to the decision in the *City of Columbia* case and subsequent to the Statutory Revision Session of the General Assembly in 1949.

The only remaining provision of the Public Service Commission statutes which relates in any way to municipally owned water systems is the general provision of Section 386.250 (7). As noted above, *Public Service Commission v. City of Kirkwood*, supra, and *Speas v. Kansas City*, supra, indicate that this section confers jurisdiction on the Commission over the service and rates of a municipally owned water system rendered to customers beyond the corporate limits of a municipality. However, these cases were decided prior to *City of Columbia v. State Public Service Commission*, supra, and prior to the elimination of municipally owned gas, electric and water systems from the specific regulatory provisions of Sections 393.130, 393.140, 393.150 and 393.160. Therefore, it does not appear that the general provisions of Section 386.250 (7), standing alone, subject the service and rates of a municipally owned water system rendered to customers beyond the corporate limits of such municipality to the jurisdiction of the Public Service Commission.

The conclusion above is supported by the decision of the Circuit Court of Cole County rendered on December 1, 1966, in *Valley Sewage Company v. Public Service Commission*, Case No. 23169. In 1965 the General Assembly amended Section 386.250, by adding paragraph 9 which purported to extend the jurisdiction, supervision, powers and duties of the Public Service Commission to the services and rates of privately owned sewer systems. None of the other regulatory sections of the Public Service Commission statutes were amended to include privately owned sewer systems. The Court held that any construction of the statute which granted power to the Public Service Commission to supervise, regulate, oversee or otherwise control in any manner or respect privately owned sewer systems would constitute an unconstitutional delegation of legislative power to the Commission in violation of Article III, Section 1 of the Constitution. This office understands that no appeal from this decision was taken and that the judgment therein is final. This office is in agreement with the decision and is of the opinion that the reasoning therein applies with equal force to Section 386.250 (7).

#### CONCLUSIONS

A city of the third class which owns and operates a water system may sell water to a city of the fourth class, to a village, to a

Honorable Ronald M. Belt

public school in a city of the fourth class and to an individual inhabitant of a city of the fourth class. A city may not own and operate facilities beyond its corporate limits to deliver water sold by it to public or private customers located beyond such corporate limits. Sales of water by a city to public or private customers located beyond its corporate limits are not subject to the jurisdiction of the Public Service Commission. A city of the third class which owns and operates a gas system may not sell gas to public or private customers located beyond its corporate limits. This opinion does not apply to cities having combined waterworks and sewerage systems which fall within the provisions of Section 250.190, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Thomas J. Downey.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General



DEVELOPMENT: A development finance corporation formed  
FINANCE CORPORATION: under the provisions of Chapter 371, RSMo,  
may borrow money from any number of persons  
including members at the same time. Money borrowed from nonmembers  
may be secured as provided by Section 371.130 (4), RSMo Supp. 1965,  
in any priority.

OPINION NO. 15 (1967)  
OPINION NO. 147 (1966)

March 23, 1967

Honorable Donald C. Anton  
Office of General Counsel  
Small Business Administration  
Washington, D. C. 20416



Dear Mr. Anton:

This is in answer to your request for an opinion concerning Section 371.130 (4), RSMo Supp. 1965, and asking whether under this provision a development finance corporation may "borrow money from any number of persons at the same time and issue any type of security in any priorities or none to the lenders individually except from members" of the development finance corporation.

Chapter 371, RSMo, was enacted to establish a source of credit known as development finance corporations for the promotion, development and conduct of expanded business activities in the state. Section 371.010, RSMo Supp. 1965.

Section 371.130, RSMo Supp. 1965, enumerates the powers of such development finance corporations and subsection 4 which empowers the corporation to borrow money reads as follows:

"(4) To borrow money and otherwise incur indebtedness for any of the purposes of the corporation; to issue its bonds, debentures, notes or other evidences of indebtedness, whether secured or unsecured, therefor; and to secure the same by mortgage, pledge, deed of trust or other lien on its property, franchises, rights and privileges of every kind and nature or any part thereof;"

Section 371.120, RSMo Supp. 1965, requires members of the corporation to lend funds to the corporation and reads as follows:

Honorable Donald C. Anton

"1. The members of the corporation shall consist of such national and state banks, trust companies, stock or mutual insurance and surety companies as make application for membership in the corporation and membership becomes effective upon the acceptance of the application by the board of directors.

"2. Each member shall lend funds to the corporation pursuant to the commitment of the member as and when called upon by the corporation to do so, but the total amount on loan by any member at any one time shall not exceed the following limit to be determined as of the time it became a member and shall thereafter be annually readjusted in the event of any change in the base of the loan limit of such member:

(1) National and state banks and trust companies, two per cent of capital and surplus;

(2) Stock insurance companies, two per cent of capital and surplus;

(3) Surety and casualty companies, two per cent of capital and surplus;

(4) Mutual insurance companies, two per cent of guaranty fund or of surplus whichever is applicable.

"3. All loan limits shall be established at the thousand dollar nearest to the amount computed on an actual basis.

"4. All cash for funds which members are committed to lend to the corporation shall be prorated among the members in the same proportion that the commitment of each bears to the aggregate commitment of all members.

"5. Upon written notice given sixty days in advance, a member of the corporation may withdraw from membership in the corporation at the

Honorable Donald C. Anton

expiration date of such notice and after the expiration date shall be free of obligations hereunder except those accrued or committed by the corporation prior to the expiration date.

"6. All loans to the corporation by members shall be evidenced by bonds, debentures, notes or other evidences of indebtedness of the corporation which shall be freely transferable at all times and which bear interest at a rate of not less than one-fourth of one per cent in excess of the rate of interest determined by the board of directors to be the prime rate prevailing at the date of issuance thereof in the city of St. Louis on unsecured commercial loans."

It is clear from reading the two sections that the members must lend funds to the corporation and that the corporation may borrow same. However, the corporation is not limited in subdivision 4 of Section 371.130, supra, to borrowing money only from members.


It is our opinion, then, that a development finance corporation may borrow money from any number of persons including members at the same time. The corporation may, upon incurring indebtedness from persons other than members, either secure or not secure such debts. If the debt is secured it shall be "by mortgage, pledge, deed of trust or other lien on its property, franchises, rights and privileges of every kind and nature or any part thereof" and may furthermore be issued in any priorities.

#### CONCLUSION

It is the opinion of this office that a development finance corporation formed under the provisions of Chapter 371, RSMo, may borrow money from any number of persons including members at the same time. Money borrowed from nonmembers may be secured as provided by Section 371.130 (4), RSMo Supp. 1965, in any priority.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

AID TO BLIND:  
DEPARTMENT OF PUBLIC  
HEALTH AND WELFARE:

State Welfare Department is required to prepare public assistance budget of income and expenses in determining need for aid to the blind.

OPINION NO. 222 (1966)  
17 (1967)

January 24, 1967

Honorable Robert A. Young  
State Senator, 24th District  
3500 Adie Road  
St. Ann, Missouri



Dear Senator Young:

This is in response to your letter regarding the administration of the Aid to the Blind Program in this state. You enclose a letter you received from Mr. G. Arthur Stewart, President, Missouri Federation of the Blind, Inc., giving their views concerning the matter and requesting an opinion from this office regarding the same.

The state program for Aid to the Blind and Blind Pensions are provided for in Chapter 209, RSMo 1959, as amended. There are two separate programs with different eligibility requirements, each administered by the State Division of Welfare of the Department of Public Health and Welfare. The question submitted deals only with Aid to the Blind Program, which plan is found in Sections 209.210 to and including 209.340, RSMo 1959, as amended. Section 209.220, RSMo 1959, provides:

"1. As a guide to the interpretation and application of this law, the public policy of this state is declared to be that the care, relief and welfare of blind persons who are in need and who are unable to support themselves in whole or in part is a special matter of state concern and requires the enactment of this measure to promote the public health and general welfare of the citizens of this state.

"2. To provide such care and aid to the deserving blind at public expense, a statewide system of aid to the blind is hereby established to operate in a uniform manner with due regard to the economic opportunities of blind persons and recognizing that the needs of employed blind persons require retention



Honorable Robert A. Young

of an amount of their income to meet the special expenses arising from blindness.

"3. It is hereby expressly declared to be the intention of this general assembly to grant pensions to the blind as provided in sections 209.010 to 209.160, and aid to the blind as provided herein, and that the words 'pensioning of the deserving blind' as used in any law of this state shall be construed to include aid to the blind."

Section 209.230, as amended in 1963, provides in part that "Aid to the blind shall be granted under this law to a blind person" and including certain qualifications as set out in the statute, one of which is subparagraph 8, which reads as follows:

"(8) Who does not have an income, or is the recipient of three thousand dollars or more per annum from any source whatever, or who lives with a sighted spouse who does not have an income, or is the recipient of three thousand dollars or more per annum from any source whatever;"

Section 209.240, as amended in 1965 provides in part:

"1. The division of welfare shall, for the purpose of obtaining federal financial participation in aid to the blind payments, prepare a budget taking into consideration the necessary expenses in accordance with standards developed by the division of welfare and the income and resources of the individual claiming aid to the blind. In preparing such budget the division of welfare shall disregard the first eighty-five dollars per month of earned income plus one-half of earned income in excess of eighty-five dollars per month. Every person passing the vision test and having the other qualifications provided in this law shall be entitled to receive aid to the blind in the amount of eighty dollars monthly. Any person disqualified to receive aid to the blind may apply for pension to the blind as provided in sections 209.010 to 209.160.

Honorable Robert A. Young

The question submitted concerns the interpretation of these provisions of the above statutes. As stated in the letter from the Missouri Federation of the Blind, Inc., their contention is that any person meeting the requirements of Section 209.230, subdivision 8, is ipso facto in need and hence eligible for benefits provided he meets the other requirements of this section, while the State Division of Welfare contends that such person must be found to be in need after a budget study is made by the Division taking into consideration the income and expenses as provided in Section 209.240. In other words, the federation contends that if the person does not have income of three thousand dollars or more he is eligible for Aid to the Blind benefits without regard to his needs if he meets the other provisions of Section 209.230.

The rule in construing statutes is stated in *Parks v. State Social Security Commission*, 160 S.W.2d 823, 1.c. 825, as follows:

"[1, 2] We think that the language of the statute is plain, but even were it subject to construction, the rule of statutory construction mentioned by claimant are not applicable. It is well established that 'in construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applied, and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately. \* \* \* It is a cardinal rule of construction of statutes that effect must be given, if possible, to the whole statute and every part thereof. To this end it is the duty of the court, so far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible. Just as an interpretation which gives effect to the statute will be chosen instead of one which defeats it, so an interpretation which gives effect to the entire language will be selected as against one which does not.' (Italics ours.) 59 C.J. pp. 993 to 999, inc."

In the case of *City of St. Louis v. Carpenter*, 341 S.W.2d 786, 1.c. 788, in discussing the rules for statutory construction, it is stated:

Honorable Robert A. Young

"[5, 6] Statutes relating to the same or similar subject matter, even though enacted at different times and found in different chapters, are in pari materia and must be considered together when such statutes shed light on the statute being construed. State ex rel. Smithco Transport Co. v. Public Service Commission, Mo., 316 S.W.2d 6, 12[6]; State ex rel. Wright v. Carter, Mo., 319 S.W.2d 596, 600[7]; State ex rel. Spink v. Kemp, 365 Mo. 368, 283 S.W.2d 502, 526[38].\* \* \*"

Sections 209.220, 209.230 and 209.240, regarding Aid to the Blind, were first enacted in 1951 as part of the Aid to the Blind Law. Section 209.230 was amended in 1963 and 209.240 in 1965. These sections must be construed together and effect given to each section, if possible. Section 209.220, supra, states that as a guide to the interpretation and application of this law the public policy of this state is declared to be that the care, relief and welfare of blind persons who are in need and who are unable to support themselves in whole or in part is a special matter of state concern. It is clear that under this provision Aid to the Blind law benefits are to be paid only to persons that are in need and that persons not in need are not eligible even though their vision may be impaired and they meet other eligibility requirements.

The Social Security Law, Title X, Section 1202, Title 42, Section 1202, Federal Code Annotated, Section 1202, Title 42, United States Code Annotated, Pocker parts, provides in part that the State agency in administering the Aid to the Blind program shall:

"(a) \* \* \* (8) provide that the State agency shall, in determining need, take into consideration any other income and resources of the individual claiming aid to the blind, as well as any expenses reasonably attributable to the earning of any such income, except that, in making such determination, the State agency shall disregard (A) the first \$85 per month of earned income, plus one-half of earned income in excess of \$85 per month, (B) shall, for a period not in excess of twelve months, and may, for a period not in excess of thirty-six months, disregard such additional amounts of other income and resources, in the case of an individual who has a plan for achieving self-support approved by

Honorable Robert A. Young

the State agency, as may be necessary for the fulfillment of such plan;"

In order to comply with this federal statute, Section 209.240 was enacted and it provides in part that the Division of Welfare "shall", for the purpose of obtaining federal financial participation in Aid to the Blind programs, prepare a budget taking into consideration the necessary expenses and the income and resources of the individual claiming Aid to the Blind. It further provides for disregarding the same amounts of earned income as provided in the federal law.

In Section 209.230 (8), supra, Aid to the Blind benefits can be paid to a person having an income of three thousand dollars or less. It cannot be paid to a person having more than three thousand dollars, regardless of the need of such person for assistance, because the maximum income is set in the statute at three thousand dollars.

In the letter from the federation the fact is mentioned that Section 209.230 provides in part that aid "shall" be granted. It is their contention, apparently, that this is a mandatory requirement.

Section 209.240, supra, provides that the Division of Welfare "shall" prepare a budget of income and expenses in determining the needs of the person.

It is our view that the Division of Welfare is required under Section 209.240 to prepare a budget in determining the eligibility of a person to receive Aid to the Blind who meets the requirements of Section 209.230, supra. It was certainly not intended for a budget to be prepared for persons having three thousand dollars or more income because they could not be considered eligible for any assistance under Section 209.230. Therefore, in order to give Section 209.240 effect it must apply to persons having income of three thousand dollars or less, under Section 209.230(8), and that a person having income of three thousand dollars or less is eligible for Aid to the Blind only when he is found to be in need under the provisions of Section 209.240.


#### CONCLUSION

It is the opinion of this office that the Division of Welfare is required to prepare a budget as provided in Section 209.240 of the income and expenses in determining the needs of an applicant for Aid to the Blind who is otherwise eligible under Section 209.230.

Honorable Robert A. Young

The foregoing opinion, which I hereby approve, was prepared  
by my Assistant Moody Mansur.

Yours very truly,



NORMAN H. ANDERSON  
Attorney General

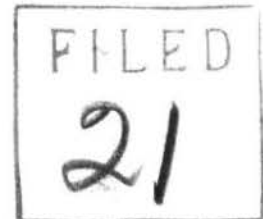
MOTOR VEHICLE REGISTRATION:  
LICENSES:  
DEPARTMENT OF REVENUE:

Subsection 1 of Section 301, RSMo 1959, prohibits any person from transferring his license plate to another person except for a period of fifteen days following the sale of a motor vehicle.

OPINION NO. 21  
259 (1966)

November 2, 1967

Honorable Alden S. Lance  
Prosecuting Attorney  
Andrew County  
415 West Main Street  
Savannah, Missouri 64485



Dear Mr. Lance:

This is in answer to your request for an opinion of this office which request reads as follows:

"1. Section 301.140, RSMo., 1959, As Amended, provides for the transfer of motor vehicles and the expiration of the right to use the number plates. My question is as follows: The local office of the Department of Revenue has transferred the registration plates from one individual to his brother-in-law. We seem to be getting conflicting opinions from the Department of Revenue as to whether or not they are approving such actions. Can such transfers of registration plates be accomplished under present Missouri law?

"Also, can such transfers be accomplished under Missouri law as between husband and wife, or between a minor and an adult who may be holding the title to the motor vehicle in his or her name as purely a convenience for the minor?"

We only consider the situation where any of the above named persons have a car registered in their individual name and attempt to transfer registration to one of the designated persons again in an individual name.

Subsection 1 of Section 301.140, RSMo 1959, is applicable and reads as follows:



Honorable Alden S. Lance

"1. Upon the transfer or ownership of any motor vehicle or trailer, the certificate of registration and the right to use the number plates shall expire and the number plates shall be removed by the owner at the time of the transfer of possession, and it shall be unlawful for any person other than the person to whom such number plates were originally issued, to have the same in his or her possession whether in use or not; except that the seller may give the buyer written permission to use such plates for a period of fifteen days, in which event the buyer shall have and display on demand of any proper officer said written consent of previous owner, together with an affidavit or other proof that he has made application for registration. At the expiration of this fifteen day period the said number plates shall be returned to the original owner."

It has been held that the provisions for transfer are mandatory, State ex rel. Connecticut Fire Ins. Co. v. Cox, 306 Mo., 537, 552, 268 S.W. 87, 37 A.L.R. 1456; Pearl v. Interstate Securities Co., Mo.App., 198 S.W.2d 867, reversed on other grounds, 357 Mo. 160, 206 S.W.2d 975, and should be strictly construed, Peper v. American Exchange National Bank in St. Louis, Mo.App., 205 S.W.2d 215, affirmed 210 S.W.2d 41.

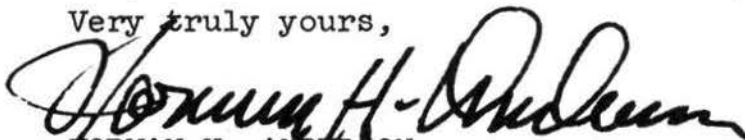
Accordingly, we construe the plain terms of the statute to mean that none of the persons you inquire about may have their registration plates transferred to another person except of course for the fifteen day period prescribed.

#### CONCLUSION

It is the opinion of this office that subsection 1 of Section 301, RSMo 1959, prohibits any person from transferring his license plate to another person except for a period of fifteen days following the sale of a motor vehicle.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

NOTARY PUBLIC:  
NOTARIAL SEAL:  
SECRETARY OF STATE:

It is therefore the opinion of this office that the seal of a notary public may be imprinted directly upon the document or the impression may be affixed to the document. Either application is valid if the said seal bears the inscribed information required by Section 486.040, RSMo 1959. Any administrative rule or practice to the contrary appears to be in conflict with the above stated authorities.

OPINION NO. 23  
(267-1966)

May 31, 1967

Honorable James C. Kirkpatrick  
Secretary of State  
State Capitol  
Jefferson City, Missouri



Dear Mr. Kirkpatrick:

Recently you informed this office that your office had a rule against accepting documents which bore a notary public seal by any means other than impression on the document itself.

You further stated that many notaries public affix a properly imprinted seal, by some adhesive means, to the document instead of impressing the seal directly on the document.

As a result of your rule, above stated, and the practice of some notaries public of affixing the seal by adhesive means an opinion was requested concerning the word "seal" as used in Section 486.040, RSMo 1959, and the validity of your rule.

Section 486.040, supra, states in part:

"Every notary public shall provide a notarial seal, on which shall be inscribed his name, the words 'notary public,' the name of the county or city, if appointed for such city, in which he resides and has his office, and the name of the state; \* \* \*"

A reading of this section and the related sections of Chapter 486, RSMo, reveals that there is no language directing the application of the seal of the office. The general law relating to this matter

Honorable James C. Kirkpatrick

is stated in 66 C.J.S., Notaries, Section 8:

"\* \* \* When its form is not otherwise prescribed by statute, the seal may consist in an impression on paper or on some tenacious substance affixed thereto, with intent to make a seal, \* \* \*"

Section 486.040, supra, does require that the seal be inscribed with:

- 1) Name of the notary public;
- 2) The words "notary public";
- 3) Name of the county of residence and office, or city if appointed for a city; and
- 4) Name of the state.

It would therefore appear that since there are no laws directing the application of the seal, either an impression directly on the document or an affixed impression is permissible. The only applicable Missouri law on this point is found in Meyers vs. Russell, 52 Mo. 26. In the Russell case, supra, the appellant had alleged that a deposition taken before a notary public was invalid because the attesting seal was imprinted upon the paper itself. The Court ruled against appellant on this point and stated (l.c. 26):

"\* \* \* The seal was affixed by an impression on paper, and that was sufficient, it was not necessary that it should be impressed on wax, according to the old common law rule."

In Missouri then under the doctrine of Meyers vs. Russell, either a direct impression or an affixed impression is a valid application of the notaried seal. There is nothing in Section 486.040, supra, or related sections, requiring that a mechanical device be used which will cause an impression on the document rather than having another piece of paper with the seal imprinted become a part of the document. In either event, it seems that the document is imprinted with the seal.

#### CONCLUSION

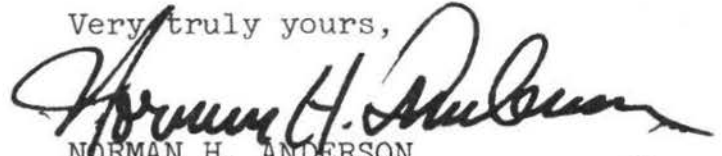
It is therefore the opinion of this office that the seal of a notary public may be imprinted directly upon the document or the impression may be affixed to the document. Either application is

Honorable James C. Kirkpatrick

valid if the said seal bears the inscribed information required by Section 486.040, RSMo 1959. Any administrative rule or practice to the contrary appears to be in conflict with the above stated authorities.

The foregoing opinion, which I hereby approve, was prepared by my assistant, William A. Peterson.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General

FIRE DISTRICTS: A provision for pensioning of salaried employees  
COUNTIES: of a fire district who incur non-service connected  
PENSIONS: disabilities requiring their retirement from ser-  
CLASS ONE COUNTIES: vice of the fire department is within the authority  
of the board of directors of a class one county  
fire district.

OPINION NO. 30  
303(1966)

March 23, 1967

Honorable E. J. Cantrell  
Representative, 6th District,  
St. Louis County  
3406 Airway  
Overland 14, Missouri



Dear Representative Cantrell:

This opinion is written in response to your request for an official opinion from this office, which request states as follows:

"...can the following be incorporated into a pension plan. A provision for pensioning of salaried employees incurring non service connected disabilities requiring their retirement from active service in the department."

More specifically, your request concerns Sections 321.220 and 321.240, RSMo 1959. These sections apply to fire protection districts in class one counties.

Sections 321.220 and 321.240, RSMo 1959, have been revised by Chapter 321, RSMo Cum. Supp. 1965.

Section 321.220, RSMo Cum. Supp. 1965, states in part:

"For the purpose of providing fire protection to the property within the district, the district and, on its behalf, the board shall have the following powers, authority and privileges:

\* \* \* \* \*

"(15) To provide for the pensioning of the salaried members of its organized fire department of the district and to provide for the payment of death benefits to the widows and minor children of members of its organized fire department who

Honorable E. J. Cantrell

lose their lives in the performance of their duties; \* \* \* " (Emphasis added)

Section 321.220 (15), RSMo Cum. Supp. 1965, explains the procedure by which a fire district in a class one county may incorporate a pension provision, and further states:

" \* \* \* If a majority of the qualified voters casting votes thereon at the election be in favor of the question, this subdivision shall take effect in the district forthwith and the board shall then and thereafter effect such a program for the pension and benefit payments authorized at the election as shall be necessary for the operation of the district. \* \* \* "

In an earlier opinion from this office (Opinion No. 329, dated September 27, 1962, and addressed to the Honorable E. J. Cantrell) this office stated at page 4:

" \* \* \* the Legislature of the State of Missouri had constitutional authority to enact subdivision 15 of Section 321.220, RSMo Cum. Supp. 1961 (now Section 321.220, RSMo Cum. Supp. 1965) giving the board of directors of such fire district the power to provide for the pensioning of the salaried members of its organized fire district if such authority is approved or provided therein \* \* \* "

Subsection (14) of Section 321.220, RSMo Cum. Supp. 1965, states:

"(14) To have an exercise all rights and powers necessary or incidental to or implied from the specific powers granted herein. Such specific powers shall not be considered as a limitation upon any power necessary or appropriate to carry out the purposes and intent of sections 321.010 to 321.450; \* \* \* "

Section 321.220, RSMo Cum. Supp. 1965, expressly authorizes "the pensioning of the salaried members of its organized fire department." This language is not limited to service connected disabilities, it broadly provides for pensioning its members. The clause following the above quoted language is limited with respect to death benefits to widows and minor children. However, this limitation does not apply to the first clause of the sentence.




Honorable E. J. Cantrell

CONCLUSION

It is the opinion of this office that a provision for pensioning of salaried employees of a fire district who incur non-service connected disabilities requiring their retirement from service of the fire department is within the authority of the board of directors of a class one county fire district.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Gerald L. Birnbaum.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

LEASED PROPERTY:  
LEASES:  
PROPERTY ASSESSMENT:  
PROPERTY TAX:  
PROPERTY TAX EXEMPTION:  
TAXATION:  
EXEMPTIONS

Property leased by an individual or private business to the United States, the state, city, county or a political subdivision of the state, under a lease-purchase or rental-purchase agreement, for a consideration, is not owned by such governmental unit and is not exempt from taxation under Section 137.100, RSMo 1959, prior to the time the option to purchase is irrevocably exercised.

Property leased by an individual or private business for a consideration under a rental-purchase or lease-purchase agreement to an organization to be used for religious worship, for schools or colleges or for charitable purposes, is not exempt from taxation under Section 137.100, RSMo, prior to the exercise of the purchase option because the property is not being used exclusively for such purposes.

OPINION NO. 31  
312 (1966)

June 8, 1967



Honorable Bill D. Burlison  
Prosecuting Attorney  
Cape Girardeau County  
708 Broadway  
Cape Girardeau, Missouri 63701

Dear Mr. Burlison:

This is in answer to your request for an opinion of this office which reads in part as follows:

"We have some cases in which individuals or private businesses are entering into rental-purchase or lease-purchase agreements with governmental, non-profit or public institutions, in which, after a given time, the real estate is conveyed at a nominal price to the public or charitable body.

"The County Court wishes to know whether, in such an arrangement, the individual or private business is entitled to a reduction or elimination of the tax assessment during the period of the rental-purchase or lease-purchase."

We assume that the rental-purchase or lease-purchase agreements to which you refer are agreements which give the lessee the option at sometime during the period of the lease to purchase the property and have the lease payments applied toward the purchase price.

Honorable Bill D. Burlison

If the option is not exercised, the agreement would be treated as a lease only.

There are certain well established rules which must guide any determination of whether certain property is exempt from taxation. Generally, all property is liable to taxation unless specifically exempted. Taxation is the rule, exemption is the exception; and claims for exemption are not favored in the law. Bethesda General Hospital v. State Tax Commission, Mo.Sup., 396 S.W.2d 632; Midwest Bible and Missionary Institute v. Sestric, Mo.Sup., 260 S.W.2d 25. Exemption statutes must be strictly construed against the taxpayer and the burden is on the party claiming the exemption to establish clearly his right thereto. In re First National Safe Deposit Co., Mo. Banc, 173 S.W.2d 403; State ex rel St. Louis Y.M.C.A. v. Gehner, Mo.Sup., 11 S.W.2d 304. However such statutes also should be reasonably construed so as not to curtail the intended scope of the exemption. Bethesda Naval Hospital v. State Tax Commission, Mo.Sup., 381 S.W.2d 772; St. Louis Gospel Center v. Prose, Mo.Sup., 280 S.W.2d 827.

Constitutional exemption from taxation of certain property is granted by Article X, Section 6 and Article III, Section 43 of the Missouri Constitution.

Article X, Section 6 provides:

"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void." (Emphasis added)

Article III, Section 43 provides in part:

" \* \* \* No tax shall be imposed on lands the property of the United States; \* \* \* "

Implementing the constitutional provisions of Section 6, Article X, is Section 137.100, RSMo, which provides:

Honorable Bill D. Burlison

"The following subjects are exempt from taxation for state, county or local purposes:

- (1) Lands and other property belonging to this state;
- (2) Lands and other property belonging to any city, county or other political subdivision in this state, including market houses, town halls and other public structures, with their furniture and equipments and on public squares and lots kept open for health, use or ornaments;
- (3) Nonprofit cemeteries;
- (4) The real estate and tangible personal property which is used exclusively for agricultural or horticultural societies organized in this state;
- (5) All property, real and personal actually and regularly used exclusively for religious worship, for school and colleges, or for purposes purely charitable and not held for private or corporate profit, except that the exemption herein granted does not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom is used wholly for religious, educational or charitable purposes."

The exemptions provided by both the Constitution and Section 137.100 are of two types. The first is "property of" or "belonging to" the state, county and other political subdivisions, and nonprofit cemeteries, or the "property of" the United States.

The statutory words "belonging to" have generally been construed by the courts as denoting ownership. *Plank v. Auditor General*, (Mich, 1916) 158 N.W. 856; *Evangelical Baptist Benes and Missionary Society v. Boston* (Mass. 1910) 90 N.E. 572; *People ex rel McCullough v. Bennett Medical College* (Ill. 1911) 94 N.E. 110. The other phrases used in the Constitution, "property of" also may be used

Honorable Bill D. Burlison

synonymously with ownership. Such provisions may be contrasted with the provisions of Section 41.670 which exempts "all buildings leased by the state for military purposes."

Property leased to the United States, the state, county or other political subdivision in the state or a nonprofit cemetery does not "belong to" or is not the "property of" the lessee and, even though such property is used by the governmental unit for public purposes, it is not exempt from taxation under Section 137.100. Baldwin v. Board of Tax-Roll Collectors, (Okla. 1958) 331 P.2d 412; See United States v. Tax Commission of City of New York, 254 NYS 2d 785; and Texas v. Moody's Estate, C.C.A. Texas 1946, 159 P.2d 698.

The second "type" of exemption which is provided in paragraphs (4) and (5) of Section 137.100 is "all property, actually and regularly used exclusively for religious worship for schools and colleges, or for purposes purely charitable \* \* \* " Under this type of exemption the use of the property rather than the ownership is the sole consideration determining its tax exempt status.

The question then arises (when privately owned property is leased to a religious or charitable institution or school or college and used by the lessee exclusively for religious, charitable or educational purposes) is the "use" of the property that of the owner who leases it for profit or is it that of the lessee who uses it for exemptive purposes. Although there is a diversity of authority on this question arising in part from differences in the exempting statutes and on the particular fact situation, see 57 A.L.R. 860, Missouri apparently has adopted the rule that the "use" of the property is that of the lessor when the property is leased for a profit.

In State v. Hammer v. Macgurn, 86 S.W. 138, 187 Mo. 238, an individual fee owner leased certain property to the board of president and directors of the St. Louis Public Schools at a rental of \$900. It was not disputed that the property was used for school purposes. The constitutional and statutory exemption was provided for "lots in incorporated cities \* \* \* when the same are used exclusively for religious worship, for schools" etc. In holding that the property was not tax exempt, the Court said:

"\* \* \* So that, after all, the real question in this case depends upon what is meant by the term 'used exclusively for religious worship, for schools, or for purposes purely charitable'. The ownership or title to the property is not the determining factor, for if the property is owned by a religious, charitable or school organization, and is leased or rented for use for any other purpose than such as the Consti-

tution contemplates, the land is not exempt. So, if the private owner of the land allows his land to be used for such purposes, and charges no rent, and derives no personal benefit from the land, the land is exempt from taxation, because the land is then devoted exclusively to such a use. This was the case in *City of Louisville v. Werne* (Ky.) 80 S.W. 224, relied on by the defendants. For in such cases, the owner contributes the use of his land to public or quasi public use, or to such a use as the Constitution contemplates, and derives no gain or profit for himself, and therefore the state does not exact a tax from his land with one hand while accepting a contribution of the use of his land with the other hand. But, on the contrary, when the owner leases his land to the public for a public use, or to a quasi public body for a charitable or religious use, and applies the rents derived from the land to his own personal advantage, he contributes nothing to the public or to charity, he loses nothing by the use, he is not a benefactor to any one, but he stands before the law in exactly the same light as any one else who leases his land for any other purpose, and uses the rents for his own advantage, and therefore he is not entitled to any special consideration at the hands of the law or the government, and his property is not exempt. There would be just exactly as much, and no more or less, reason for holding that the property of one who sold provisions or supplies to a charitable institution, which were used to support the lives of the inmates thereof, was exempt from taxation. In both cases he would get and appropriate to his own use the proceeds or products of his property, just the same as if it had been rented, or sold to a private citizen, or to a business concern; and in neither instance would the state or the charitable institution be benefited one jot or tittle by the transaction, for it would pay a full consideration for all it got. \* \* \*

Although there are decisions to the contrary, the view expressed in the above case appears to be the more reasonable. If



Honorable Bill D. Burlison

a private individual is leasing his property and receiving profits therefrom as rent it is only reasonable that this property should be subject to taxation. Certainly one who leases property to another for a non-exempt use for the same rental would be taxed.

Of course each tax exemption case is peculiarly one which must be decided on its own facts. *Midwest Bible and Missionary Institute v. Sestric*, supra. Your question is of a general nature and we have answered it accordingly. As the Court stated in the quoted portion of *State ex rel Hammer v. Macgurn*, supra, there may be circumstances in which property is leased that the foregoing reasoning does not apply and the property may be held to be tax exempt. But in our opinion, property leased by an individual or private business to a school or a religious or charitable organization for a rental fee is not used exclusively for schools or religious or charitable purposes and is not exempt from taxation under Section 137.100, RSMo 1959.

Nor do we believe that this holding is affected by the fact that the lease is coupled with an option to purchase prior to the time such option is irrevocably exercised. Even though the rental fee may ultimately become the purchase price, the property would not "belong to" the governmental body in the sense of being owned until the option is exercised. Nor would the rental fee become the purchase price prior to the exercise of the option.

Regarding these so-called lease-purchase or rental-purchase agreements, we enclose a copy of our opinion written on October 14, 1949, to Mr. Paxton P. Price, State Librarian in which we held that a County Library Board may not obtain a library building under a long term lease with an option to buy because of the provisions of Section 26(a) of Article VI, Constitution of Missouri, 1945, which provides in part:

"No county, city, incorporated town or village, school district or other political . . . subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this Constitution."

See also Section 28, Article IV of our Constitution limiting appropriations to confer authority to incur an obligation after the termination of the fiscal period to which it relates. We are not attempting to determine the legality of any particular agreement but enclose this opinion as expressing our view as to the legality of such agreements insofar as public purchases are made.

Honorable Bill D. Burlison

You also ask as to whether the tax assessment should be reduced during the period of the rental-purchase or lease-purchase agreement. Since the owner is employing his property in a profitable manner, we can set no reason or basis for reducing the assessment.


CONCLUSION

It is the opinion of this office, that property leased by an individual or private business to the United States, the state, city, county or a political subdivision of the state, under a lease-purchase, or rental-purchase agreement, for a consideration, is not owned by such governmental unit and is not exempt from taxation under Section 137.100, RSMo 1959, prior to the time the option to purchase is irrevocably exercised.

Property leased by an individual or private business for a consideration under a rental-purchase or lease-purchase agreement to an organization to be used for religious worship, for schools or colleges or for charitable purposes, is not exempt from taxation under Section 137.100, RSMo, prior to the exercise of the purchase option because the property is not being used exclusively for such purposes.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Yours very truly

  
NORMAN H. ANDERSON  
Attorney General

Enclosure: Op. No. 71  
10/14/49--Price

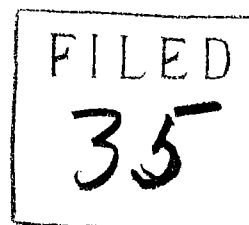
PERSONAL PROPERTY:  
STATUTORY CONSTRUCTION:  
STEAM:  
TAXATION:  
SALES-USE TAX:

Sales tax may not be assessed upon  
the sale of steam used for heating  
purposes.

OPINION NO. 35  
(349 - 1966)

March 7, 1967

Honorable James E. Godfrey  
State Representative - 62nd District  
St. Louis City  
418 Olive Street  
St. Louis, Missouri 63102



Dear Representative Godfrey:

This is in answer to your request for an opinion of this office as to whether sales taxes may be levied pursuant to Section 144.020, RSMo Supp. 1965, upon the sale of steam.

This section, so far as here pertinent provides:

"1. A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state. The rate of tax shall be as follows:

(1) Upon every retail sale in this state of tangible personal property a tax equivalent to three per cent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to three per cent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange; except as otherwise provided in section 144.025;

\* \* \* \* \*

(3) A tax equivalent to three per cent of amounts paid or charged on all sales of electricity or electrical current, water and gas, natural or artificial, to domestic, commercial or industrial consumers;"

\* \* \* \* \*

Honorable James E. Godfrey

A "sale at retail" is defined in Section 144.010, RSMo to include:

"1. (8)(b) Sales of electricity, electrical current, water and gas, natural or artificial, to domestic, commercial or industrial consumers;"

It is well established that a taxing statute must be strictly construed in favor of the taxpayer and against the taxing authority and the fact that a particular subject of taxation is within the purview and intendment of a taxing statute must clearly appear. *A. P. Green Fire Brick Co. v. Missouri State Tax Commission*, Mo. Sup., 277 S.W.2d 544. Any doubt as to the imposition of a tax must be resolved in favor of the taxpayer. *Shively v. City of Keytesville*, Mo.App., 238 S.W.2d 682; *State ex rel. Kansas City Power & Light Co. v. Smith*, Mo. Banc., 111 S.W.2d 513. In the latter case the court in construing subparagraph (3) held that sales tax could not be assessed upon sales of electricity to the Kansas City Public Service Company to be used to propel its street cars over its street railway system because the company was not a commercial or industrial consumer.

The sale of steam is not specifically included in Section 144.020. Such sale could be held to be taxable only under subparagraph (3) as a sale of water, or gas, or as tangible personal property, taxed under the general provision of subparagraph (1).

In considering this question we assume that the inquiry is being made as to sales of steam heat by means of steam piped to radiators. See *Detroit Edison Co. v. State*, Mich., 298 N.W. 525. In such cases the steam circulates through the heating system of the user and does not, as such, become the property of the user. The real purchase is of heat and since heat is not tangible personal property the sale of steam heat is not made taxable as such by subparagraph (1) of Section 144.020.

Neither do we believe that the sale of steam heat is taxable under subparagraph (3). Although steam is a form of gas, we think it clear that from the use of the words "natural or artificial" in reference to gas, that steam would not be included under the term, but that the term "gas" would include only heating and cooking gas, whether natural or artificial. See 26 C.J.S., Gas, p. 614 and 617.

Honorable James E. Godfrey

Nor do we think that steam used for heating purposes is included within the term "water" as used in Section 144.020, subparagraph (3). Water, generally, is sold in specified amounts and comes under the control of and becomes the property of the buyer. As we stated earlier, when steam is used for heating purposes, the sale is not of the steam itself, which does not become the property of the user, but of the heat generated by the steam.

Since the sale of steam is not specifically made subject to sales tax and because there is substantial doubt as to whether steam used for heating purposes may be classed either as water, or gas, or as tangible personal property in our opinion this doubt must be resolved in favor of the taxpayer and the sale of steam for heating purposes may not be subjected to the imposition of sales tax under Section 144.020.


In reaching this conclusion we are also mindful of the rule that where there is doubt as to the meaning of a statute, the construction given by the officers charged with its administration shall be considered to determine its meaning. *England v. Eckley*, Mo. Sup., 330 S.W.2d 738, 744; *Rathjen v. Reorganized School R-II of Shelby County*, Mo. Sup., 284 S.W.2d 516, *Wiley v. Stewart Sand & Material Co.*, Mo. App., 206 S.W.2d 362. The Department of Revenue has never interpreted Section 144.020 to impose a tax upon the sale of steam and never has attempted to collect taxes on such sales.

If the legislature desires to place a tax upon the sale of steam, although the inclusion of the word "steam" probably would include the sale of steam heat, *Detroit Edison Co. v. State*, supra, the better procedure would be to add both "steam" and "steam heat."

#### CONCLUSION

It is the opinion of this office that sales tax may not be assessed upon the sale of steam used for heating purposes.

The foregoing opinion, which I hereby approve, was prepared by my Assistant John H. Denman.

Yours very truly,  
  
NORMAN H. ANDERSON  
Attorney General

GRAIN WAREHOUSE FUND:  
GENERAL REVENUE FUND:  
AGRICULTURE:

Fees for services rendered under Grain Warehouse Law shall be set by Commissioner of Agriculture to produce sufficient revenues to meet the expenses of administering the law.

OPINION NO. 37  
(353 1966)

February 2, 1967

Honorable Dexter D. Davis  
Commissioner of Agriculture  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. Davis:

Reference is made to your request for a formal opinion from this office as follows:

"Senate Bill No. 15 of the first regular session of the 73rd General Assembly abolished certain funds and placed balances and receipts into the General Revenue Fund. Our Grain Warehouse Fund of the Department of Agriculture was one such fund affected.

The 73rd General Assembly also enacted a new Grain Warehouse Law which went into effect October 13, 1965. Within this law, (section 411.150, paragraph 1, 2, 3), pertains to the setting of fees for the services rendered by this division. I would like to have a formal opinion as to the complete meaning of this section.

Does the abolishment of the Grain Warehouse Fee Fund supersede section 411.150 of our Grain Warehouse Law, not making it a necessity to be self-sustaining as we have been in the past?"

Senate Bill No. 15 was enacted by the 73rd General Assembly to take effect on November 1, 1965, and the provisions which are relevant to the questions you have raised are as follows:



Honorable Dexter D. Davis

"Section 1. The following funds established in the state treasury are abolished:

\* \* \*  
Grain Warehouse Fund  
\* \* \*

Section 2. The balances in these funds are transferred to the general revenue fund. All appropriations from these funds shall be considered as appropriations from general revenue. All valid claims for payment from these funds shall be paid from general revenue.

Section 3. All references to these funds in the statutes of Missouri shall mean general revenue.

\* \* \* \* \*

Section 5. State fiscal reports shall show separately the amount of fees and receipts as reported and deposited in individual funds herein abolished.

Section 6. Provisions of law relating to the amount or limit on the appropriation or expenditures for any agency or purpose shall remain in effect."

\* \* \* \* \*

Section 411.150, RSMo 1959, as amended by House Bill 716 of the 73rd General Assembly provides as follows:

"1. The commissioner shall have full power to fix the fees for sampling, inspection, weighing, protein or other chemical analysis, and moisture testing or for additional services of whatever nature consistent with the provisions of sections 411.010 to 411.701, which fees shall be regulated in such manner as will, in the judgment of the commissioner, produce sufficient revenue to meet the necessary expenses of the services of sampling, inspection, weighing, chemical analysis or moisture testing, and for administration and clerical work in connection therewith.

Honorable Dexter D. Davis

2. All fees shall be paid to the collector of revenue and thereupon deposited in the state treasury to the credit of the grain warehouse fund, and from such fund appropriations may be made for the purposes of paying salaries and expenses necessary for complying with the provisions of sections 411.010 to 411.701.

3. At the end of each biennial period, all money remaining in the fund herein established in excess of one hundred thousand dollars shall be transferred by the state treasurer and become a part of the general revenue fund."

The basic rule of statutory construction is to discover the lawmakers' intention and, if possible, effectuate that intention, and thereby attain the object and purpose of the statute; *Hern v. Carpenter*, 312 S.W.2d 823.

The provisions of Section 411.150 indicate that the Legislature intended to establish the Grain Warehouse Fund for the purpose of providing funds to meet the expenses of the administration and enforcement of the Missouri Grain Warehouse Law (Chapter 411, RSMo) by the Department of Agriculture. The cited section authorized the Commissioner to fix fees for services rendered under the law in amounts sufficient to produce revenue to meet the necessary expenses of administering the law. Appropriations for the purpose of administering the law are to be made from the fund resulting from the collection of such fees. At the end of each fiscal period provision was made for the transfer of all money in the fund in excess of \$100,000 to the General Revenue Fund.

Senate Bill No. 15 abolished 35 special funds, including the Grain Warehouse Fund, and transferred the balances from these funds to the General Revenue Fund. However, statutory provisions for the collection of fees for the purpose of raising sufficient revenue to administer laws, such as the Missouri Grain Warehouse Law, were not repealed.

It appears that the sole purpose of Senate Bill 15 was to streamline the administration of the state's fiscal affairs by consolidating 35 special funds into the General Revenue Fund. The special purposes for which the funds are collected remain in the statutes and the monies remain available in the General Revenue Fund for appropriation by the Legislature to effectuate these special purposes.

Honorable Dexter D. Davis

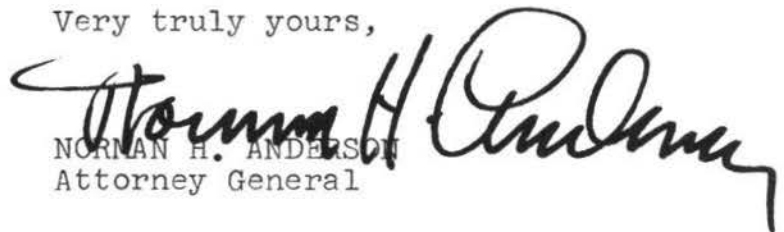
Section 411.150 manifests an intention for the Commissioner of Agriculture to set the amount of fees for services performed under Chapter 411 so that such fees shall produce sufficient revenue to meet the necessary expenses of administering Chapter 411. In prior years the fees collected were deposited in the Grain Warehouse Fund and appropriations were made from such fund for the purpose of administering the law. The only changes brought about by Senate Bill 15 are that the fees collected go directly into the General Revenue Fund and appropriations for administering the law are made directly from the General Revenue Fund. It remains the intention of Section 411.150 that the administration of the Grain Warehouse Law be self-sustaining through the collection of fees provided for by such section.

#### CONCLUSION

Pursuant to Section 411.150, RSMo Supp. 1965, fees for services rendered under Chapter 411 shall be set by the Commissioner of Agriculture for the purpose of producing sufficient revenue to meet the necessary expenses of administering Chapter 411. Pursuant to Senate Bill 15 of the 73rd General Assembly the fees collected shall be deposited into the General Revenue Fund and appropriations made therefrom for the necessary expenses for administering Chapter 411.

The foregoing opinion, which I hereby approve, was prepared by my Assistant Thomas J. Downey.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

OPINION NO. 39  
Answered by letter--(Peterson)

March 14, 1967

Honorable C. P. Lehen  
Prosecuting Attorney  
Montgomery County  
Montgomery City, Missouri



Dear Mr. Lehen:

Recently you requested an opinion from this office in a letter in which you stated:

"If an individual is being held in the County Jail, pending trial on a felony charge and requires medical treatment or hospitalization, and thereafter is convicted of a felony for which the State pays the costs, are the medical and hospital expenses part of the costs paid by the State?"

Section 221.120, RSMo 1959, places a duty on the jailer to provide medical attention for sick prisoners. In addition that statute states:

"... the costs of which shall be taxed and paid as other costs in criminal cases; or the county court may, in their discretion, employ a physician by the year, to attend said prisoners, and make such reasonable charge for his service and medicine, when required, to be taxed and collected as aforesaid." (Emphasis added.)

The language above emphasized, "paid as other costs", has been interpreted by this office in an opinion issued to the Honorable Paul D. Hess, January 26, 1965, a copy of which is enclosed. On page 1 of the enclosed opinion you will find the following language:

Honorable C. P. Lehen

"We have carefully studied the applicable statutes, together with the case of Miller v. Douglas County, 102 S.W. 996, referred to in your letter, and are of the opinion that the expenses involved are costs incurred on behalf of the defendants and may not be taxed against the state, or for that matter, against the county. As you know, Section 550.010 RSMo expressly provides that in the event of a conviction no costs incurred on the part of the defendant except costs for board may be paid by the state or county. Costs for medicine and medical attention are not costs of prosecution, but are incurred on the part of the defendant just as are costs for board. Board costs could not be paid but for the statutory exception. See also Cramer v. Smith, Mo. Supp., 168 S.W. 2d 1039, holding that the state is liable for costs of a transcript only because of the statutory language expressly requiring that such costs be taxed against the state or county. No such language appears in Section 221.120. It follows that the opinion of February 28, 1933, is correct and remains the opinion of this office."

The above quoted language relies in part on an opinion issued to the Honorable Forrest Smith, February 28, 1933. A copy of that opinion is also enclosed.

We believe the two enclosed opinions fairly cover the subject matter of your request and provide the answers to your questions. Medical costs pursuant to Section 221.120, supra, cannot be paid by the State in the absence of a statute specifically directing such payment.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

WAP/jlf  
Enc.--2

Op. No. 406, Hess, 1/26/65  
Op., Smith, 2/28/33

DRIVERS LICENSES:  
DRIVERS LICENSE REVOCATION:  
DRIVING WHILE INTOXICATED:  
MOTOR VEHICLES:

1. Commission of another offense incident to driving while intoxicated is not necessary in order to convict an individual for the offense of "driving while intoxicated."

2. An individual arrested for "driving while intoxicated" may have his license revoked for refusing to submit to a breath test, whether the arrest involved another offense incident to driving while intoxicated or not.

OPINION NO. 41 (1967)  
362 (1966)

August 3, 1967

Honorable Gene McNary  
Prosecuting Attorney  
St. Louis County  
Clayton, Missouri 63105



Dear Mr. McNary:

Your predecessor in office requested an opinion concerning the acquittal of a defendant of the charge of Driving While Intoxicated because the arresting officer had placed the defendant under arrest for Driving While Intoxicated and had not filed any additional charge against the defendant.

Section 564.440, RSMo 1965 Cum. Supp., provides in part:

"No person shall operate a motor vehicle while in an intoxicated condition. Any person who violates the provisions of this section shall be deemed guilty of a misdemeanor on conviction for the first two violations thereof, \* \* \* and a felony on conviction for the third and subsequent violations, \* \* \*."

There is no reference to the necessity of charging and proving any other offense before one can be convicted of "driving while intoxicated." Consequently, the court action referred to is erroneous. See State v. Hicks, Mo., 376 SW2d 160; State v. Davis, Mo., 371 SW2d 270; State v. Richardson, Mo., 343 SW2d 51; State v. Ryan, Mo., 275 SW2d 350.



Apparently there has been some confusion in the application of the criminal sanctions against driving while intoxicated with Section 564.441, RSMo, 1965, Cum. Supp., authorizing the administration of a breath test to determine the blood alcohol content of anyone arrested for any offense arising out of acts which the arresting officer had reasonable grounds to believe were committed while the person was operating a motor vehicle while intoxicated. Section 564.444, RSMo Cum. Supp., 1965, provides that the driver's license shall be revoked if he refuses to submit to the test.

As was pointed out in the opinion of this office, (No. 390-66, copy attached) conviction or acquittal of the offense of driving while intoxicated has nothing to do with revocation of the driver's license for refusal to submit to the breath test. (See also attached Opinion No. 69 - 1966)

The statute providing for revocation (Section 564.444, RSMo 1965, Cum. Supp.) also provides that the person whose license has been revoked may request a hearing before a court of record in the county where he resides or where the arrest occurred, which court shall determine three things only:

- "(1) Whether or not the person was arrested;
- (2) Whether or not the arresting officer had reasonable grounds to believe that the person was driving a motor vehicle while in an intoxicated condition; and,
- (3) Whether or not the person refused to submit to the test."

Reaching the question of whether or not the individual "was arrested for any offense arising out of acts \* \* \* etc.," committed while the driver was driving in an intoxicated condition, there is a universally accepted axiom of statutory construction to the effect that general statutory language should be given its plain ordinary meaning according to the context in which it appears (see State vs. Plotner, Mo., 222 SW 767.) Applying reasonable construction to the language employed, it is not too difficult to see that driving a car while drunk, which is prohibited by Section 564.440, is an "offense" arising out of an "act" which the person is committing by "driving a motor vehicle while intoxicated."

Hapless confusion of terminology and semantics cannot be employed to defeat the plain meaning of the law involved.

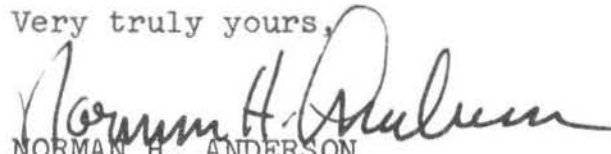
#### CONCLUSION

1. An individual may be convicted for the offense of driving while intoxicated whether he has committed another offense incident thereto or not.

2. An individual who has been arrested for "driving while intoxicated" and who has refused upon request to submit to a test of his breath for determining alcoholic content may have his license revoked whether the arrest involved another offense incident to driving while intoxicated or not.

The foregoing opinion which I hereby approve, was prepared by my Assistant, Howard L. McFadden.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General

Encl:

No. 69 (1966)  
February 28, 1966  
Honorable Thomas A. David

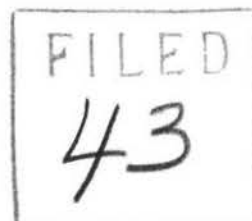
No. 390 (1966)  
August 11, 1966  
Honorable Daniel V. O'Brien

PARKS: The City of Sedalia cannot undertake to construct a park four miles outside its corporate limits.  
COUNTIES:  
THIRD CLASS COUNTIES:  
MUNICIPAL PARKS:

OPINION NO. 369 (1966)  
43 (1967)

January 17, 1967

Honorable Joe F. Rains  
Representative, Pettis County  
700 East Tenth Street  
Sedalia, Missouri



Dear Representative Rains:

This is in answer to your opinion request which in part reads as follows:

"In the old section of the statutes which permitted to develop and operate parks, Section 90.010, R.S. Missouri, the law required such parks to be within one mile of the city, so far as third class cities were concerned. However, the new recreation laws passed recently made no mention of the one mile limitation (see Sections 64.750 et seq.). Our first question, then, is whether the City of Sedalia can ignore the old one mile requirement in proposing a park four miles distant from the present city limits."

Section 90.010, RSMo 1959, cited in the opinion request, is a statute applicable to all cities. Under this section, a city can acquire land only within its boundaries, or within one mile thereof.

Section 77.140, RSMo 1959, is directed specifically at cities of the third class. This section provides for the establishment of parks by the council within the city, or within three miles thereof.

Since Sedalia is a city of the third class, we rule that Section 77.140, imposing a three mile limit, is the governing section, and not Section 90.010, since the latter section is directed at cities in general.

However, Section 64.755, Subsection (1), RSMo Cum. Supp. 1965, imposes no limitation. It provides:

Honorable Joe F. Rains

"1. The governing body of any political subdivision may provide, establish, equip, develop, operate, maintain and conduct a system of public recreation, including parks and other recreational grounds, playgrounds, recreational centers, swimming pools, and any and all other recreational areas, facilities and activities, and may do so by purchase, gift, lease, condemnation, exchange or otherwise, and may employ necessary personnel. Funds to be spent for such purposes may be set up in their respective budgets by any governing body."

Section 64.760, RSMo Cum. Supp. 1965, provides for a joint operation of a recreational system. This section states:

"Any two or more governing bodies may establish and conduct jointly a system of public recreation and may exercise all the powers authorized by sections 64.750 to 64.780. The respective governing bodies administering programs jointly may provide by agreement among themselves for all matters connected with the programs and determine what items of cost and expense shall be paid by each."

We have recently held that the authority given a political subdivision in Section 64.755 to construct a park outside its limits was limited to those situations when it was undertaking a cooperative recreational program with one or more other political subdivisions as provided for in Section 64.760. Opinion No. 133, Kiser, 12/6/66.

Stated differently, this opinion holds that Section 64.760 impliedly limits political subdivisions from spending public funds outside their limits except where they cooperate with another political subdivision in the manner provided.

It follows, therefore, that, since the proposed park would be located four miles outside the city limits, and since the City of Sedalia is not undertaking this project on a cooperative basis with another political subdivision, we must rule that Section 64.-755, supra, does not permit this undertaking.

Thus, the City of Sedalia must rely on Section 77.140, supra, for authority to construct parks outside its corporate limits. As noted previously, this section limits such construction to the corporate limits or within three miles thereof.

Honorable Joe F. Rains

Since the opinion request states that the park is proposed for four miles outside the corporate limits of the City of Sedalia, we conclude that the project is prohibited.

CONCLUSION

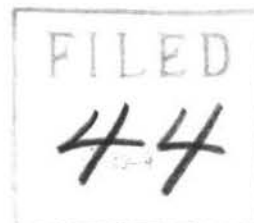
It is the opinion of this office that the City of Sedalia, a city of the third class, acting alone, may not undertake to construct a park located four miles outside its corporate limits.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Donald R. Wilson.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

April 20, 1967



Mr. Robert L. Hyder  
Chief Counsel  
Missouri State Highway Commission  
Jefferson City, Missouri

Dear Mr. Hyder:

This letter responds to your inquiries that you submitted in the form of three separate questions we are setting out below:

"1. It appears that the present practice in making withdrawals from the State Road Fund involves in at least some instances a charge to the State Road Fund, a corresponding credit to the General Revenue Fund, and the issuance of a Treasurer's draft against the latter rather than directly from the State Road Fund. Should not withdrawals be made directly against the State Road Fund?

"2. It appears to be the present practice to charge the State Highway Commission with balances which exist in the State Highway Department Fund. We believe that the State Highway Commission may consider as its assets only that appropriation from the State Highway Department Fund which may be made to it for the six purposes set forth in Section 30(b) of Article IV of the Missouri Constitution and that such appropriations (for the purpose of discussion, they amount to some seven or eight million dollars per year,) together with the 'State Road Fund,' constitute the 'assets' which the Commission may consider in programming and for other lawful expenditures.

"3. Should not the State Highway Commission, Auditor, and Treasurer comply with Section 226.230 RSMo., 1959, and make transfers from the State Highway Department Fund to the State Road Fund?"



Honorable Robert L. Hyder

The genesis of this problem seems to lie (under the first question) against the current accounting procedures and in the second question, in the preparation of certain fiscal reports prepared by the State as they are applied to the Highway Commission.

In the first question, the accounting procedures, among others, to which the Highway Commission takes exception arises as one example, from the method of paying bills of the Commission by check (issued upon a warrant) and drawn by the State Treasurer makes a charge against the State Road Fund a corresponding credit in the same amount to the General Revenue Fund. Then a check is drawn by the State Treasurer against the General Revenue Fund. To illustrate the problem further, it sometimes happens that a check is lost. The money is then retained in the General Revenue Fund until the statute (Section 30.200 RSMo., 1959) runs. Then upon request of the Highway Commission, a new check is issued by the State Treasurer for the same bill but chargeable against the General Revenue Fund. Obviously, this is simply an accounting procedure and it is to these procedures, as an example, that the Highway Commission takes exception.

As we understand your first question, we find it is addressed to the propriety of an accounting system that has existed for an extended period (according to your letter) and is currently being used by the several state agencies. The accounting procedures of this state and its several agencies are the responsibility of the state auditor pursuant to Section 13, Article IV of the Missouri Constitution and Section 29.180 RSMo., 1959, which implements the Constitutional provisions. In effect, this Section directs the state auditor, in cooperation with the budget director, to establish appropriate systems of accounting. These systems that he has provided for or changes that he may make to the system are valid so long as there is no diversion of funds from one appropriated purpose to another without the sanction of law. We are of the opinion that the administrative handling and accounting procedures of which you complain are enunciated by the state auditor (in conjunction with the budget director) and rests in the sound discretion of these officers so designated by the Constitution and statutes. We conclude therefore that you should address your application for relief in this area to the state auditor and the budget director. In essence, this is not a legal problem and we can not help you in this area.

Your second question has as its main thrust the propriety of certain entries shown on state fiscal reports that allegedly indicate balances chargeable to the State Highway Commission when in fact these balances do not reflect the true financial

situation. We do, of course, condemn an accounting report that is false. You complain that the State Highway Commission is charged with balances that exist in the State Highway Department Fund which, in fact, do not belong to them. This leads others to believe that the State Highway Commission has an inordinately large amount at its disposal whereas in truth and in fact, the State Highway Department Fund (account 705) is used to pay funds to other departments and not solely the State Highway Commission. The State Highway Department Fund (so denominated by Section 226.200 RSMb., 1959) has as its source of revenue those monies provided by Section 30(a) of Article IV, Missouri Constitution. This Section provides that "from such fund shall be paid or credited with costs:

- "(1) Of collection of all said state revenue derived from highway users as an incident to their use or right to use the highways of the state;
- "(2) Of maintaining the state highway commission;
- "(3) Of maintaining the state highway department;
- "(4) Of any workmen's compensation for state highway department employees;
- "(5) Of the share of the highway department in any retirement program for state employees, only as may be provided by law; and
- "(6) Of administering and enforcing any state motor vehicle laws or traffic regulations."

It is true other departments do share in the proceeds as, for example, the Department of Revenue recently received \$650,000 as cost of collection of subsection (1), supra and the State Highway Patrol received some \$10,000,000, for its operating costs (in part) under sub-paragraph (6) above. You received substantial sums by way of transfer to State Road Funds (account 710) from this account (No. 705), during this fiscal year as for example:

- (a) On November 4, 1966, a transfer of \$20,000,000 from the State Department Fund to the State Road Fund;

Honorable Robert L. Hyder

(b) September 21, 1966, a transfer of \$20,000,000 from the State Highway Department Fund to the State Road Fund;

(c) September 7, 1966, a transfer of \$10,000,000 from the Highway Department Fund to the State Road Fund;

(d) July 22, 1966, a transfer of \$10,000,000 from the State Highway Department Fund to the State Road Fund; and

(e) July 23, 1966, a transfer of \$10,000,000 from the State Highway Fund to the State Road Fund.

These above funds are devoted to construction of highways and are known as "State Road Funds" (Account No. 710.)

You also received about \$8,000,000 which set aside in the State Highway Fund for the cost of maintaining the State Highway Commission, the State Highway Department and any Workmen's Compensation for State Highway Department employees. It, thus, appears that you do benefit substantially from the State Highway Department Fund. We do agree that the title of the fund (State Highway Department Fund) as designated by statute (Section 226.200 RSMo., 1959) may not be precisely accurate in its connotations to the average person but any change in title would require legislative action.

We agree that the State Highway Commission may consider, as its operating assets, that sum which is set aside from the State Highway Department Fund to it for the purposes set out in Section 226.200 RSMo., 1959, and that such sum together with the State Road Fund constitute the assets which the Commission may consider in programming and for other lawful expenditures of the Commission.

We suggest your remedy is purely a fiscal matter within the competence of the State Auditor in that he can change, in his discretion, the fiscal reports to show that the State Highway Commission has as its assets only those monies from the State Highway Department Funds allocated to the Department for operating costs pursuant to Section 226.200 RSMo., 1959, and those transfers to the State Road Fund for the purposes set forth in Section 30(b), Article IV, Missouri Constitution, which is the "State Road Fund" that we have adverted to above. Again, this is not a legal problem.

In response to your third question, Section 226.230 RSMo., 1959, reads as follows:

Honorable Robert L. Hyder

"The auditor and treasurer and the state highway commission are directed to use their judgment in anticipation of collections coming into these funds and to make transfers when same shall be deemed advisable by them."

This section imposes a mandate on the named officers and the Commission and directs their conduct with respect to these funds. We see no ambiguity. This Section compels the several officers and the Commission to use their collective judgment on the anticipated incomes coming into these funds and to make such transfers from the State Highway Department Fund to the State Road Fund in their collective discretion when such transfers shall be deemed advisable by them. The Section is mandatory and requires the exercise of a collective effort to arrive at a collective decision.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

NATIONAL FOREST RESERVE FUNDS: Money received from the National  
TEACHER'S FUND: Forest Reserves under Chapter 12,  
SCHOOL DISTRICTS: RSMo, and distributed to the vari-  
TAXATION - SCHOOLS: ous counties for the use of school  
COUNTIES: districts shall under Section 165.011,  
RSMo Supp. 1965, be placed to the  
credit of the teacher's fund.

OPINION NO. 46  
(384-1966)

March 7, 1967

Honorable Haskell Holman  
State Auditor  
State of Missouri  
Capitol Building  
Jefferson City, Missouri



Dear Mr. Holman:

This is in answer to your request for an opinion of this of-  
fice which reads as follows:

"In a recent audit of a six-director school district, it was found that the board of education distributed the monies received from National Forest Reserve funds under Section 12.100, R. S. Mo., 1959, to the several funds in the same manner as provided by Section 165.011, Cum. Suppl., 1965, in the distribution of monies received from other sources of taxation.

"I will appreciate your advice and of-  
ficial opinion in answer to the following question:

'Would the method used in Section 12.100, R. S. Mo., 1959, be applicable in the distribution of monies received from the National Forest Reserve to the several funds at the discretion of the board of education in a six-director school district, or must the proceeds from such source be distributed to the several funds on the basis of the respective tax levies as provided by Section 165.011, Cum. Suppl., 1965.'"

Honorable Haskell Holman

Section 12.070, RSMo 1959, provides the manner that money received by Missouri from the National Forest Reserves shall be expended. This section reads in part as follows:

"\* \* \* shall be expended as follows:  
Seventy-five per cent for the public schools and twenty-five per cent for roads in the counties in which national forests are situated. The funds shall be used to aid in maintaining the schools and roads of those school districts that lie or are situated partly or wholly within or adjacent to the national forest in the county. The distribution to each county from the proceeds received on account of a national forest within its boundaries shall be in the proportion that the area of the national forest in the county bears to the total area of the forest in the state, as of June thirtieth of the fiscal year for which the money is received."

This section, then, directs the manner that the money is distributed to various counties and how much is to be used to aid schools. It does not direct how the money is to be expended after the money reaches the various counties.

Section 12.100, RSMo 1959, reads as follows:

"The county court of each county receiving any such moneys shall use the funds to aid in maintaining the schools and roads and for defraying any of the expenses of the county in accordance with the provisions set forth in sections 12.070 and 12.080. The county court shall allow to the school districts and for roads an amount based upon their respective levies equal to that which would ordinarily be allowed to them out of taxes from property owned by the United States if the property were privately owned before using any of the moneys for defraying other expenses of the county."



Honorable Haskell Holman

This section, then, directs the manner in which the county court allocates money to the various school districts.

Neither Section 12.070, supra, nor Section 12.100, supra, directs how the school districts, once they receive the money, must expend the money.

Section 165.011, RSMo Supp. 1965, provides for the creation of certain funds for the allocation of all school moneys. This section reads in part as follows:

"The following funds are created for the accounting of all school moneys: Teachers' fund, incidental fund, free text-book fund, building fund, and debt service fund. The treasurer of the county, township or school district shall open an account for each fund specified in this section, \* \* \* ." (Emphasis ours)

The statute then directs that money received from various sources shall be credited to the various funds.

It is our opinion that the specific method for allocation of all school moneys by school districts must be followed here. Therefore, the money received by the school district from National Forest Reserve funds must be distributed as provided by Section 165.011, supra.

Section 165.011, supra, then provides for moneys coming from various sources to be divided and distributed to the various funds and in addition to other moneys the following is credited to the teachers' fund:

" \* \* \* and all other moneys received from the state except as herein provided, shall be placed to the credit of the teacher's fund. \* \* \* "

It is our opinion that money received by Missouri from the National Forest Reserves and distributed to the various counties for the use of school districts is money received from the state and is therefore to be placed to the credit of the teacher's fund.

#### CONCLUSION

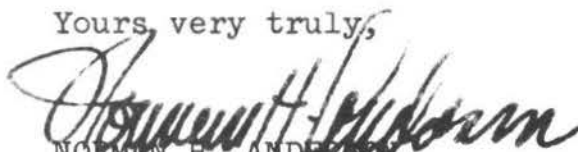
It is the opinion of this office that money received from the

Honorable Haskell Holman

National Forest Reserves under Chapter 12, RSMo, and distributed to the various counties for the use of school districts shall under Section 165.011, RSMo Supp. 1965, be placed to the credit of the teacher's fund.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Yours very truly,



NORMAN H. ANDERSON  
Attorney General

INSURANCE: Scheme for recovery of medical and hospital expenses through voluntary contributions constitutes engaging in insurance business.

OPINION NO. 50  
(402, 1966)

August 22, 1967

Honorable Robert D. Scharz  
Superintendent of Division of Insurance  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. Scharz:

Reference is made to your letter requesting a formal opinion from this office as follows:

"Is a corporation, organized under Chapter 352, R.S.Mo. 1959, engaging in an insurance business when it has members paying a specified annual membership fee, which members proportionally contribute a sum of money for a hospital bill of another member after the bill is incurred?"

The inquiry arose in regard to proposed Articles of Incorporation of the Missouri Benevolent Association and the Contributing Disability Benefit Certificate to be issued by the proposed association.

Article IV of the proposed Articles of Incorporation provides as follows:

"The purpose of this association shall be to organize a group of people together in a special fellowship with benevolent and charitable purposes so as to aid its members in time of need through voluntary contributions in the form of disability benefits for the incapacity of any of their members through sickness or accident, and at the discretion of the Board of Directors to call for such voluntary contributions from its members, and if so determined by the Board of Directors, to contribute thereof for charitable and benevolent purposes to such incapacitated member his or her heir or heirs or relative or relatives as the Board should determine."

Honorable Robert D. Scharz

The following provisions of the Benefit Certificate relate directly to the question which you have raised.

"While the member shall continue as a contributing disability benefit member as provided in the present by-laws or amendment thereto, he will be entitled to disability, sickness and accident benefits including while he or any family member listed hereon shall be confined in any hospital.

\* \* \* \* \*

"Accidents are covered from first day and 'Sickness' means sickness, illness or disease which is contracted and begins and causes loss after the certificate has been in force for 30 days from its issue date.

"Provided that if hospitalization is due to a condition that is pre-existing the date of this certificate, no benefit will be payable for any hospitalization commencing prior to 6 months after issue date of this certificate.

\* \* \* \* \*

"The Midwest Benevolent Association Accident and Sickness Plan was primarily formed to provide small cost protection to its members, by the voluntary contribution of other members whereby such donation shares part of the cost when a fellow member becomes incapacitated by accident or sickness.

"Since the plan is based on the donation of the members to members in need, the Association is formed into groups who will help and contribute to one another in the event of an accident or sickness. However, each group of members will consist of persons who agree individually and not jointly to make a donation within thirty (30) days after notification, not to exceed One Dollar (\$1.00) for each member of their group, that becomes injured or sick. For example, if a member

Honorable Robert D. Scharz

of one of the groups becomes ill, or is involved in an accident causing injury, then each member of the group donates money to pay the necessary doctor and hospital bills up to but not to exceed \$2,000.

\* \* \* \* \*

"The members are covered up to 2,000 dollars (\$2,000) for any one sickness or accident to pay hospital and doctor charges. This plan covers all hospital room cost, x-ray, laboratory, tissue examination, operating room, anesthetic, medicines and drugs, special nurses, antibiotics, blood, and blood transfusions, oxygen, and all other hospital charges. Also the clinic or doctor's office when such calls result in surgery or hospitalization, plus emergency outpatient care (when hospitalization is not required) on any accident in addition, no limit on any one specific use on any preceding items. Doctor to receive only his regular charge in full. All pre-existing conditions are covered after member is in plan six months. However, the pre-existing conditions will entitled the members coverage up to and not to exceed five hundred dollars. The Board of Directors after their investigation of the case may if the facts warrant grant additional coverage to the member to include maximum donation up to \$2,000.00.

\* \* \* \* \*

"The plan extends to each member regardless of other health or accident plans. The member may have full benefits up to but not exceeding \$2,000. When a member becomes ill or incapacitated by a sickness or accident the member will notify the Midwest Benevolent Association and sent to the Association all itemized medical expense statements incurred in their treatment of their particular ailment. A letter giving the details of the injury or illness should accompany the statement. The Midwest Benevolent Association upon receipt of the member's itemized medical expense statements check the validity of the claim and if satisfied that the claim is a legitimate one will then notify the other members of the group that a member is in need of a donation. The Association upon receipt of fellow members donations will pay to the claimant member the donations received not to exceed \$2,000.

Honorable Robert D. Scharz

It is not the purpose of the Association to mislead or misinform its members so the following information is set out in large type.

"DONATIONS WILL BE ASKED JUST FOR THE ACTUAL COST OF EACH SICKNESS OR ACCIDENT. IN NO CASE WILL A MEMBER BE PAID MORE THAN ACTUAL CHARGES, NOT TO EXCEED TWO THOUSAND DOLLARS.

\* \* \* \* \*

"FAILURE TO DONATE WITHIN THIRTY DAYS WILL VOID YOUR MEMBERSHIP IN THE SICKNESS PLAN BUT MEMBER MAY STILL REMAIN IN ASSOCIATION.

"The members understand that the Midwest Benevolent Association is not an Insurance Company, but rather a benevolent Association for helping fellow members in times of sickness and accident. As such the Association can not and does not guarantee any rates or benefits and the claimant member receives only what the members in the group donate.

\* \* \* \* \*

"I have agreed with the Midwest Benevolent Association to join their sickness and accident plan. I understand and agree that the Midwest Benevolent Association is not an INSURANCE COMPANY, AND THEY CAN NOT GUARANTEE RATES OR BENEFITS."

Missouri's statutes do not define the term "insurance". In State ex rel. Inter-Insurance Auxiliary Company v. Revelle, 257 Mo. 529, 1.c. 535, 165 S.W. 1084, the essential elements of a contract of insurance are alluded to in the following language:

"The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss."

In the case of Rogers v. Shawnee Fire Insurance Company of Topeka, Kansas, 111 S.W. 592, 132 Mo.App. 275, 1.c. 278, the Kansas City Court of Appeals used the following language in discussing the words "indemnity" and "insurance":

"Indemnity signifies to reimburse, to make good and to compensate for loss or injury. (4 Words and Phrases, p. 3539) Insurance is defined by Bouvier, 'to be a contract by which one of the parties, called the insurer, binds himself to the other called the insured, to pay to him a sum of money, or otherwise indemnify him.'"

In Richards On Insurance, Fifth Edition, Volume 1, Section 4, p. 11, we find the following:



Honorable Robert D. Scharz

"Where statutory definition is lacking, what constitutes 'insurance' is left to judicial decision and temperament."

At 44 C.J.S., Insurance, Sec. 59, p. 528, we consider the following language appropriate as an introduction to our problem:

"Whether a company is engaged in the insurance business depends, not on the name of the company, but on the character of the business that it transacts, and whether that business constitutes an insurance business subject to regulation as such is determined by the usual course of business, and whether the assumption of a risk, or some other matter to which it is related, is the principal object and purpose of the business. In determining whether a business is an insurance business, the nature of the contract or forms in which the parties state their relations must be considered, and whether a contract is one of insurance is determined by its purpose, effect, contents and import, and not merely from its terminology, although it does not, on its face purport to be one of insurance, and even though it contains declarations to the contrary."

The following admonitions are not to be overlooked when considering whether an association is unlawfully engaged in the insurance business, and are found at 44 C.J.S., Insurance, Section 70, p. 549:

"The prohibition against engaging in the business of insurance without the prescribed authority is held absolute. In determining whether or not an association is engaged in the business of insurance in violation of law, the court is concerned with the plan as a whole and not with artificially segregated single phases of the plan."

Honorable Robert D. Scharz

In applying the principles set out above to the question under consideration, the provisions of the Benefit Certificate have been examined in relation to the above principles. The Certificate provides benefits up to \$2,000 for the payment of hospital, doctor and related medical charges resulting from sickness or accident. A fund from which the payment may be expected results from payments by the individual members which the Certificate refers to as voluntary donations. However, the Certificate provides that failure to pay a voluntary donation results in membership in the sickness plan becoming void. The voluntary donation is limited to \$1.00 for each benefit claim.

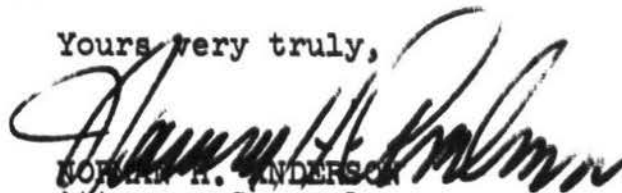
It appears that the scheme for payment of disability, sickness and accident benefits provided for by the Certificate and to be paid from the voluntary donations of the members is substantially the same as insurance on the assessment plan provided for by Section 377.010 through 377.190, RSMo 1959. The assessment in the Benefit Certificate under consideration is referred to as a voluntary donation. However, if the donation is not paid within 30 days, the membership becomes void and the member is not entitled to any disability, accident or sickness benefits. The result is identical to the failure of a policyholder to pay an assessment under assessment plan insurance. The scheme contains the elements of an agreement for a legal consideration to indemnify for a specified loss.

#### CONCLUSION

The Missouri Benevolent Association would be engaging in an insurance business pursuant to the proposed Articles of Incorporation and the Contributing Disability Benefit Certificate which have been submitted to this office for examination.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Thomas J. Downey.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

Answered by Letter (Siddens)

Opinion No. 51  
(409 - 1966)

February 21, 1967



Honorable William H. Bruce, Jr.  
Prosecuting Attorney  
Reynolds County  
Centerville, Missouri

Dear Mr. Bruce:

This is in response to your inquiry in which you state:

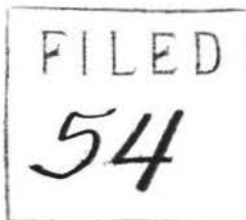
"I would like to request your opinion as to whether the title to office of a merit system employee, to wit: the local Director of Welfare, can be tried by an information in the nature of a Quo warranto?"

The office or business of County Director of Welfare is established under Section 207.060, RSMo, and is under the authority and jurisdiction of the Division of Welfare of the Department of Health and Welfare of the State of Missouri. The position is under the merit system pursuant to the provisions of Chapter 36, RSMo.

We have concluded that the County Director of Welfare is an employee of the State and is not subject to removal by the County Prosecuting Attorney in a quo warranto proceeding.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General



February 6, 1967

OPINION NO. 54  
(416-1966)  
Answered by letter-Downey

Mr. James L. Paul  
Prosecuting Attorney for  
McDonald County  
Pineville, Missouri

Dear Mr. Paul:

Reference is made to your request for a formal opinion from this office as follows:

" \* \* \* What is the obligation of a turkey grower in disposing of diseased birds that have died from a contagious disease, so that it may not be transmitted to adjoining healthy flocks."

This question arises by reason of the following situation as set forth in your letter:

"We have had a serious situation develop in this county because of the increase in the turkey raising production as to disposal of turkeys who apparently die from cholera, blackhead, typhoid or synitis.

The problem that has presented itself to this office, is I cannot find whether there is any statute regarding the disposal of these diseased birds and I am having several complaints to the effect that people who have healthy flocks are being affected by dogs or other related varmints carrying these diseased birds into their growing area, with the ultimate result of infecting healthy birds."

Mr. James L. Paul  
Page 2

Statutes in regard to the disposal of dead animals are set forth in Chapter 269 (All references herein are to the Revised Statutes of Missouri, 1959, unless otherwise specified). However, the bodies of dead fowls and birds are specifically excepted from these statutory provisions pursuant to Section 269.200 (3).

The Livestock Disease Control and Eradication Law is set forth in Sections 267.560 through 267.660. Section 267.565 (4), defines bird as being of the avian species. Section 267.590 provides that the State Veterinarian may quarantine a flock of birds found by him to be suffering from any highly contagious, communicable or infectious disease. Section 267.595 provides that an entire area may be placed under quarantine. Section 267.645 authorizes the Department of Agriculture to issue rules and regulations that may be necessary for the enforcement of the Livestock Disease Control and Eradication Law.

Upon inquiry of the State Veterinarian we are informed that no area in McDonald County and no turkey flocks therein are subject to quarantine imposed by the Department of Agriculture. Furthermore, no rules and regulations applicable to flocks of turkeys have been promulgated by the Department of Agriculture in regard to the enforcement of the Livestock Disease Control and Eradication Law. Therefore, the provisions of Sections 267.590 through 267.660 do not apply to the question which you have raised at this time.

Your attention is directed to Section 526.030. It may be that injunctive proceedings are available to relieve the situation described in your letter.

I hope that these suggestions will be helpful to you.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

*See 1978 Amendments  
to Ca. 105*

OPINION NO. 55 (1967)  
Opinion No. 147 (1966)  
Answered by Letter (Randolph)

April 19, 1967



Honorable Melvin D. Benitz  
Prosecuting Attorney  
Callaway County Courthouse  
Fulton, Missouri

Dear Mr. Benitz:

This letter is in answer to your request for an opinion of this office on two questions. Your first question is whether the Conflicts of Interests Law is violated when a city treasurer of a third class city is vice-president and a substantial stockholder of a city depository. Your second question is whether the Conflicts of Interests Law is violated when an individual who is the appointed city counselor for a third class city is also attorney for the administrator of an estate, which estate seeks to sell property within such city to such city.

As to your first inquiry, we believe that the enclosed opinion of the Attorney General, No. 400, dated October 27, 1966, covers the matter, holding that a treasurer of a third class city with a mayor-council form of government does not violate the Conflicts of Interests Law of Missouri, Section 105.490, RSMo Supp. 1965, merely because he is a stockholder and an officer of a bank which is the depository for city funds.

Your second inquiry, we think, is answered by the enclosed opinions of the Attorney General, namely, the opinion dated May 15, 1958, to Rolin T. Boulware; the opinion dated December 8, 1960, and numbered 72, to Charles A. Powell, Jr.; and Opinion No. 291, answered by letter dated July 27, 1962, to Thomas D. Graham.

Said opinion of May 15, 1958, to Rolin T. Boulware concluded that a lease consummated by city officials who have a pecuniary interest in it comes within the purview of Section 106.300, RSMo. Said opinion of December 8, 1960, to Charles A. Powell, Jr., concluded that an assistant city marshal of a third class city is prohibited by law from selling to the city in which he is assistant marshal, a motor vehicle, because of the fact that he



Honorable Melvin D. Benitz

is a city officer. Said letter of July 27, 1962, to Thomas D. Graham, concluded that it was unlawful for a third class city to pay its city attorney extra compensation for reviewing and revising and codifying the ordinances of the city.

Under the reasoning and authority in the last three cited opinions, we conclude that it is unlawful for a city counselor to represent, as attorney, an estate which seeks to sell property within such city to such city. This is true because both Sections 77.470 and 106.300 RSMo, proscribe direct and indirect interest in "any contract under the city" on the part of "any city officer." The city counselor is interested in the proposed sale, inasmuch as he conducts the legal negotiations for the administrator and receives compensation for such services. As city counselor, appointed by the mayor and council to perform legal work for the city, he is of course an officer of the city. The Conflicts of Interests Law, Sections 105.450 to 105.495, RSMo, need not be construed to answer this question since it is obviously within the purview of Sections 106.300 and 77.470, RSMo, as explicated in the enclosed opinions.

Yours very truly,

---

NORMAN H. ANDERSON  
Attorney General

Enclosures:

Opinion 400, Avery, 10-27-66;  
Opinion to Boulware, 5-15-58;  
Opinion 72, Powell, 12-8-60; and  
Opinion 291, Graham, 8-27-62.

NEWSPAPERS: Periodicals which do not have a paid circulation do not qualify as newspapers  
TOWNSHIPS: under Sections 231.280, RSMo 1959, which  
TOWNSHIP ORGANIZATIONS: provides for publication in a newspaper  
COUNTIES: of the township financial statement and  
PUBLICATION: inventory of township property.  
LEGAL PUBLICATION:

OPINION NO. 56  
(425, 1966)

March 7, 1967

Honorable Carl D. Gum  
Prosecuting Attorney of Cass County  
Court House  
Harrisonville, Missouri 64701



Dear Mr. Gum:

This is in answer to your request for an opinion of this office concerning the type of publication that constitutes a newspaper insofar as Section 231.280, RSMo 1959, is concerned. That statute provides for publication by township boards of directors in a "newspaper" of certain information regarding the fiscal operation and the physical inventory of townships in counties under township organization.

You inquire whether so-called "advertising papers" which do not have a paid circulation can qualify as newspapers under said Section 231.280. You point out that Section 493.050, RSMo 1959, provides that all public advertisements required by law shall be published in some daily, triweekly, or semiweekly newspaper of general circulation.

Section 231.280, RSMo 1959, reads as follows:

"The township board of directors in all counties under township organization shall keep, or cause to be kept, a full, true and correct record of all moneys received and disbursed on account of roads and bridges and all other receipts and disbursements of every nature in such township, showing in detail from whom and on what account such money was received, and to whom and for what purpose disbursed, together

Honorable Carl D. Gum

with a complete inventory of all tools, road machinery and other property belonging to the township, together with such other information as to the condition of roads and bridges and the needs of same as may be deemed of value, and within thirty days after the end of the fiscal year of said township board of directors, which fiscal year shall begin and end on the same date as the fiscal year of the county in which such township is located, shall cause to be published an itemized statement of such receipts and expenditures, inventory of tools, machinery and other property in some newspaper published in such township, and if there be no newspaper published in the township, then such publication may be made in any newspaper of general circulation within such township published in the county. Such statement shall be made by the township clerk under the direction of the township board, and shall be sworn to by such clerk, and it shall be the duty of the township clerk within thirty days after the end of the fiscal year of said township board to file one copy each of such detailed statement with the chief engineer of the Missouri state highway commission at Jefferson City, and with the county clerk of such county, and the county clerk shall lay the same before the county court at its next regular meeting."

Section 493.050, RSMo 1959, reads as follows:

"All public advertisements and orders of publication required by law to be made and all legal publications affecting the title to real estate, shall be published in some daily, triweekly, semiweekly or weekly newspaper of general circulation in the county where located and which shall have been admitted to the post office as second class

Honorable Carl D. Gum

matter in the city of publication; shall have been published regularly and consecutively for a period of three years; shall have a list of bona fide subscribers voluntarily engaged as such, who have paid or agreed to pay a stated price for a subscription for a definite period of time; provided, that when a public notice, required by law, to be published once a week for a given number of weeks, shall be published in a daily, triweekly, semiweekly or weekly newspaper, the notice shall appear once a week, on the same day of each week, and further provided, that every affidavit to proof of publication shall state that the newspaper in which such notice was published has complied with the provisions of this section; provided further, that the duration of consecutive publication herein provided for shall not affect newspapers which have become legal publications prior to the effective date of this section; provided, however, that when any newspaper shall be forced to suspend publication in any time of war, due to the owner or publisher being inducted into the armed forces of the United States, the same may be reinstated within one year after actual hostilities shall have ceased, with all the benefits under the provisions of this section, upon the filing with the secretary of state of notice of intention of said owner or publisher, his widow or legal heirs, to republish said newspaper, setting forth the name of the publication, its volume and number, its frequency of publication, and its readmission to the post office where it was previously entered as second class mail matter, and when it shall have a list of bona fide subscribers voluntarily engaged as such who have paid or agreed to pay a stated price for subscription for a definite period of time. All laws or parts of laws in conflict with this section except sections 493.070 to 493.120, are hereby repealed."

We enclose copies of the following opinions of the Attorney General: No. 369 to Honorable Peter H. Rea, dated October 8,

Honorable Carl D. Gum

1965; No. 38 to Honorable John F. Hayner, dated September 29, 1961; and No. 18 to Honorable J. W. Colley, dated July 2, 1957.

It is clear from the reasoning in said opinions, under the authority therein cited, that a publication must comply with the requirements of said Section 493.050 in order to be a proper medium for advertising the type of statements set out in said Section 231.280, and to qualify thereunder.


Since the "advertising papers" that you describe, not having a list of paid subscribers, do not qualify as newspapers for the purpose of publishing such public advertisements, it is illegal to use them as such.

#### CONCLUSION

It is the opinion of this office that periodicals which do not have a paid circulation do not qualify as newspapers under Section 231.280, RSMo 1959, which provides for publication in a newspaper of the township financial statement and inventory of township property.

The foregoing opinion, which I hereby approve, was prepared by my Assistant Donald L. Randolph.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

OLD AGE ASSISTANCE: PAYABLE TO:  
INMATE OF COUNTY NURSING HOME:  
COUNTY NURSING HOME:  
NON-PROFIT CORPORATING, OPERATING COUNTY:  
NURSING HOME: WHEN:

Patient in county nursing home  
established under Section 205.  
375 RSMo 1959 which is a public  
medical institution, under Sec-  
tion 208.010 RSMo 1959 may re-  
ceive old age assistance pay-

ment if otherwise eligible. Division of Welfare has discretion to pay old  
age assistance to recipient-patient in county nursing home as it deter-  
mines proper, or directly to county nursing home it has classified as  
medical institution.

OPINION NO. 58  
(439 1966)

July 6, 1967

Honorable Charles B. Faulkner  
Prosecuting Attorney  
Lawrence County  
Mt. Vernon, Missouri



Dear Mr. Faulkner:

This office is in receipt of your request for a legal opinion  
consisting of three inquiries. The first one reads as follows:

"1. Would a patient of a county nursing home  
operating as provided under Section 205.375  
RSMo 1959, prevent that patient from receiving  
public assistance under Section 208.010 RSMo  
1959, part (5) of paragraph 2, assuming quali-  
fication otherwise."

Section 208.010 Laws Mo. 1965, page 807, provides the require-  
ments one must meet in order to be eligible for public (old age)  
assistance in Missouri. Paragraph 2, Part 5 of said section reads as  
follows:

"2. Benefits shall not be payable to any  
claimant who:

(5) Is an inmate of a public insti-  
tution or is a patient in an insti-  
tution for mental diseases except  
an individual who is sixty-five  
years of age or over and is a  
patient in a state institution for  
tuberculosis or to an individual  
who is a patient in a public medical  
institution."



Honorable Charles B. Faulkner

Before the first inquiry can be answered, it must be determined if a county nursing home is a public institution within the meaning of the above quoted statutory provisions.

Our legal research fails to disclose any statutory or appellate court decisions of Missouri defining the terms "public institution", as used in the above quoted statute. Fortunately, we do find definitions of said terms elsewhere, some of which read as follows:

"A public institution is an organized activity created or established by law or public authority". 44 C.J.S. 416.

In the case of Henderson v. Shreveport Gas, Electric Light and Power Company, 63 So. 616, 618, the court defined "public institution" as found in law to be:

"The next paragraph provides for 'public institutions' which use gas. A 'public institution' is: one which is created and exists by law or public authority (32 CYC 767), such as an asylum, charity college and university, hospital, schoolhouse, etc \* \* \*".

Again in State v. Chausen, 148 P.28, at l.c. 32, the Court defined the terms "public institution", as follows:

"We understand the Attorney General's argument to be that an existing public institution is some activity of the state which has taken form and is lodged in buildings or structures. The words 'public institution' can be given no such restricted meaning. A public institution is an organized activity created or established by law or public authority."

Section 205.375, RSMo 1959, contains a definition of a nursing home and provides a county or township may acquire one, and reads as follows:

1. "For the purposes of this section 'nursing home' means a facility for the accomodation of convalescents or other persons who are not acutely ill and not in need of hospital care, but who require skilled nursing care and related medical services:

(1) Which is operated in connection with a hospital, or;

Honorable Charles B. Faulkner

(2) In which such nursing care and medical services are prescribed by or are performed under the general direction of, persons licensed to practice medicine or surgery in this state.

"2. The county court of any county or the township board of any township may acquire land to be used as sites for, construct and equip nursing homes and may contract for materials, supplies, and services necessary to carry out such purposes.

"3. For the purpose of providing funds for the construction and equipment of nursing homes the county courts or township boards may issue bonds as authorized by the general law governing the incurring of indebtedness by counties, or may provide for the issuance and payment of revenue bonds in the manner provided by and in all respects subject to Chapter 176, RSMo, which provides for the issuance of revenue bonds of state educational institutions.

"4. The county courts or township boards may provide for the leasing and renting of the nursing homes and equipment on the terms and conditions that are necessary and proper to nonprofit organizations for the purpose of operation in the manner provided by subsection 1."

It is believed a nursing home established and operated by a county in accordance with the first paragraph of Section 205.375 RSMo 1959 is a "public institution" within the meaning of said term as used in Section 208.010. In the event a nursing home established and operated by a county under Section 205.375, supra, qualifies as a "public medical institution" within the meaning of Section 208.010 Par. 2, Part 5 supra, one otherwise qualified under said Section 208.010, to receive public (old age) assistance benefits, who is an inmate of a nursing home qualifying as a public medical institution, can legally be paid old age assistance benefits as long as he is an inmate of such county nursing home.

The second inquiry of the opinion request is:

Honorable Charles B. Faulkner

"2. If the patient of a county nursing home can receive public assistance, can the public assistance be paid to the county directly on request, as part payment of the patient's care or must it be paid directly to the patient?"

We understand the second inquiry to be:

If one qualified to receive public (old age) assistance is a patient in a county nursing home, can the assistance payments be paid directly to the nursing home upon its request to the Missouri Division of Welfare, as part payment of the patient's care, with the consent of the patient, or must all such payments be made to the patient?

In view of our discussion and answer of the first inquiry, we shall consider the second inquiry as applying only to county nursing homes qualifying as public medical institutions.

In this connection we direct your attention to Section 208.180 (1) RSMo 1959, which reads in part as follows:

"Payment of benefits hereunder shall be made monthly in advance, at such regular intervals as shall be determined by the division of welfare, directly to the recipient, or in the event of his incompetency to his legally appointed guardian and in the case of a dependent child to the relative with whom he lives; provided, that payments for the cost of authorized in-patient hospital or nursing home care in behalf of an individual may be made after the care is received either during his lifetime or after his death to the person, firm: corporation, association, institution, or agency furnishing such care and shall be considered as the equivalent of payment to the individual to whom such care was rendered. All guardianship proceedings of persons applying for or receiving benefits under this law shall be carried out without fee or other expense when in the opinion of the probate court the person is unable to assume such expense. At the discretion of the court such a guardian may serve without bond."

Honorable Charles B. Faulkner

Briefly summarized, Section 208.180 supra, provides payment of public (old age) assistance shall be made at regular monthly intervals as determined by the Division of Welfare, to the recipient, or in event of his incompetency, to his legally appointed guardian. The Division of Welfare may also make payments to certain other persons or organizations to cover cost of authorized in-patient hospital or nursing home care of the recipient, to the person or organization furnishing care, which shall be considered as equivalent of payment to the person for whom such care was rendered.

Under provisions of Section 208.180 supra, the Division of Welfare may in its discretion make public (old age) assistance payments to a recipient or to an institution in which the recipient is a patient, as it may determine to be proper. The Division of Welfare informs us that it in the exercise of its discretion will make direct payments only to those institutions it has classified as medical institutions.

When a county nursing home has been classified as a "medical institution", by the Division of Welfare, it may then make public (old age) assistance payments directly to such county nursing home, rather than to the recipient, who is a patient in that institution.

Your third question assumes a negative answer to the first or second question.

Since we have ruled that a patient in a county nursing home which is a public medical institution if otherwise qualified is eligible to receive old age assistance and that the Division of Welfare has in its discretion determined that old age assistance payments will be made only to institutions classified as "medical institutions", it is apparent that no answer need be given to your third question.

#### CONCLUSION

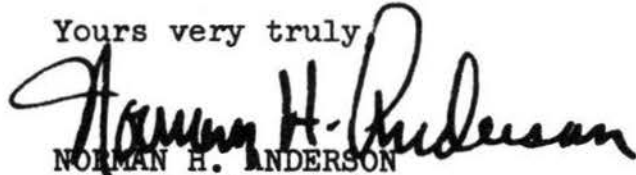
Therefore, it is the opinion of this office that a patient in a county nursing home established under Section 205.375, RSMo 1959, which qualifies as a public medical institution, within meaning of Section 208.010, Laws Mo. 1965, Page 807, may receive old age assistance payments if otherwise eligible for such payments.

It is the further opinion of this office that under provisions of Section 208.180 RSMo 1959, the Division of Welfare has discretion to make public (old age) assistance payments to a recipient in a county nursing home or directly to the county nursing home to cover partial cost of patient's care, when the Division of Welfare has classified such nursing home as a medical institution.

Honorable Charles B. Faulkner

The foregoing opinion which I hereby approve was prepared  
by my assistant, Paul N. Chitwood.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

SCHOOLS:  
COUNTY SUPERINTENDENT:  
SCHOOL DISTRICTS:  
COOPERATIVE AGREEMENTS:

1) A county superintendent does not have authority under Section 167.121, RSMo Supp. 1965, to assign a pupil from a district in the State of Missouri to attend a school district of another state.

2) The board of education of a Missouri public school district may contract with the school district and officials in another state for the providing of instructional services to pupils resident of the Missouri district where the schools of the other state

are more accessible to the pupil so long as the contract does not delegate or surrender governmental functions and duties which are inherently vested in the Missouri public school board.

OPINION NO. 60  
442 (1966)

September 21, 1967

Honorable Bernard W. Gorman  
Prosecuting Attorney  
Atchison County  
Rockport, Missouri



Dear Mr. Gorman:

This official opinion is issued in response to your request for a ruling on the following question: May the county superintendent of Atchison County, Missouri, under Section 167.121, RSMo Supp. 1965, assign students to attend a public school in the State of Iowa on the basis that the Iowa school is "more accessible"?

Sections 167.131 and 167.141, RSMo Supp. 1965, expressly provide for Missouri school districts without high schools to send resident high school pupils to a school in an adjoining county of another state and pay their tuition. Since you inquire about assignment under Section 167.121 we assume that the pupils here are not within Sections 167.131 and 167.141.

Section 167.121, RSMo Supp. 1965, provides as follows:

"If any pupil is so located that a school in another district is more accessible, the county superintendent shall assign the pupil to the other district. If it is deemed advisable to assign a pupil to an adjoining county or if a common school district is divided by a county line, then the county superintendent of the county wherein the pupil resides shall make the



assignment. If a six-director district is divided by a county line, the county superintendent of the county to which the district in which the pupil resides is assigned shall make the assignment. An assignment of a pupil is subject to an appeal to the state board of education by any county superintendent whose county is affected, and the decision of the state board of education is final. The board of directors of the district in which the pupil lives shall pay the tuition of the pupil assigned. The tuition shall not exceed the pro rata cost of instruction."

This statute authorizes assignment of pupils of one district to another. When the legislature used the term "district" in this statute, it clearly meant a district of the State of Missouri and not a public school district of another state. This meaning we believe to be evident from the terms of the whole statute. Furthermore, this statute governs the right of the district receiving the pupil as well as the district in which the pupil resides. Obviously the legislature of the State of Missouri has no control over the authority or duties of school districts in the State of Iowa.

Therefore, we are of the opinion that the county superintendent does not have authority under Section 167.121 to assign a pupil from a school district in the State of Missouri to attend school in a school district in the State of Iowa.

However, the foregoing conclusion does not preclude a Missouri pupil from attending school in the State of Iowa.

There is no requirement of Missouri law that a pupil attend a Missouri school, public or private. A child resident of Missouri so long as he complies with the compulsory attendance laws, Section 167.031, et seq., RSMo Supp. 1965, may attend any school within or without this state. However, the cost of the pupil's education can be paid out of public funds only when authorized by law.

Article VI, Section 16, Missouri Constitution, 1945, provides as follows:

"Any municipality or political subdivision of this state may contract and cooperate with other municipalities or political subdivisions thereof, or with other states or their municipalities or political subdivisions, or with the United States, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law."

Section 70.220, RSMo, 1959, provides as follows:

Honorable Bernard W. Gorman

"Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions, or with any private person, firm, association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. If such contract or cooperative action shall be entered into between a municipality or political subdivision and an elective or appointive official of another municipality or political subdivision, said contract or cooperative action must be approved by the governing body of the unit of government in which such elective or appointive official resides."

Section 70.210 defines political subdivisions to include school districts. Under Section 70.220 a school district of Missouri may contract with school districts and officials of the State of Iowa for the operation of a common public facility or service which is within the scope of the powers of the contracting parties.

This office has previously considered this statute and approved agreements providing for such things as the collection of taxes (Opinion 230, Holman, 3-29-66); the cooperative erection of hospitals, (Opinion 63, Moore, 3-27-57); and common police protection (Opinion 258, Avery, 11-4-63).

The power to enter into cooperative agreement is not unlimited. The subject and purposes of the contract must be within the scope of the powers of the cooperating subdivisions. Here we are dealing with the education of children resident of the school district. Clearly the Missouri school district has the authority to provide for the education of these children. The authority of school districts and officials of the State of Iowa is, of course, a matter of Iowa law and we express no opinion, but shall assume for the purposes of this discussion that the Iowa school district has authority to enter into an agreement with a Missouri school district and that the subject of the agreement would be within the scope of powers of the Iowa school district.

Honorable Bernard W. Gorman

Cooperative agreements under Section 70.220 are further limited by the rule that public corporations may not surrender or delegate to others their governmental powers. C.J.S., Municipal Corporations, Sections 139, 154, 1007. This office has held that Article VI, Section 16, Missouri Constitution of 1945, quoted supra, does not authorize one municipality to contract with another for municipal-judicial services for the reason that this is a non-delegable, sovereign governmental function.

The question of what functions of a public corporation may be performed by contract requires detailed consideration of each particular situation. It is a question that can be resolved only in regards to a specific case. Therefore, the holding of this opinion should be considered to apply only to the situation where a school district of Missouri contracts with a school district of another state to provide educational services to a resident of the Missouri district and not be considered as applicable to any other situation. We rule today on this situation and no other.

We are of the opinion that, where there is a need and where contracted services would be educationally sound and not inconsistent with the governmental responsibilities of a public school board, a school district of Missouri may contract with a school district of another state to provide educational services to residents of the Missouri district.

The contract should be strictly limited to the providing of instruction and other ministerial type activities. The contract should reserve to the school board of the Missouri district all governmental functions which are the non-delegable responsibility of the board. The contract would not relieve the board of its responsibility to see that adequate education is provided to resident pupils and to make such decisions as are vested by law in the board.

#### CONCLUSION

Therefore, it is the opinion of this office that:

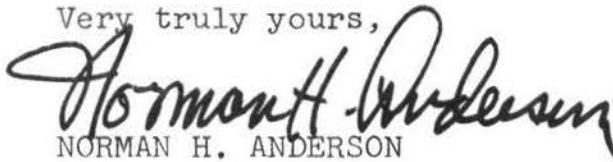
1) A county superintendent does not have authority under Section 167.121, RSMo Supp. 1965, to assign a pupil from a district in the State of Missouri to attend a school district of another state.

2) The board of education of a Missouri public school district may contract with the school district and officials in another state for the providing of instructional services to pupils resident of the Missouri district where the schools of the other state are more accessible to the pupil so long as the contract does not delegate or surrender governmental functions and duties which are inherently vested in the Missouri public school board.

Honorable Bernard W. Gorman

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Louis C. DeFeo, Jr.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General

Enclosures: Opinion 230, Holman, 3-29-66  
Opinion 63, Moore, 3-27-57  
Opinion 258, Avery, 11-4-63

SECOND CLASS COUNTIES: The County Court of a second class county  
COUNTY COURT: must comply with Section 50.660, RSMo 1959,  
COUNTY PROPERTY: and submit all contracts involving expen-  
INSURANCE: ditures of \$500.00 or more for insurance  
BIDDING: on county property to the lowest and best  
bidder after due opportunity for competition.

OPINION NO. 62(1967)  
444(1966)

June 1, 1967

Honorable Charles A. Sheehan  
State Representative  
1st District - Jefferson County  
Route #1, Box 434  
House Springs, Missouri



Dear Representative Sheehan:

This is in response to your request for an opinion from this office which reads as follows:

"1. Must a County Court in a second-class county put up for bids the insurance on county property and boilers?

"2. May the County Court determine the issuance of insurance coverage on a bid basis?"

Your opinion request concerns itself with the procedure required in letting insurance contracts on county property.

Section 50.660, RSMo 1959, states:

"Rules governing contracts (class one and two counties).--All contracts shall be executed in the name of the county by the head of the department or officer concerned, except contracts for the purchase of supplies, materials, equipment or services other than personal made by the officer in charge of purchasing in any county having the officer. No contract or order imposing any financial obligation on the county is binding on the county unless it is in writing and unless there is a balance otherwise unencumbered to the credit of the appropriation to which it is to be charged and a cash balance otherwise unencumbered in the treasury to the credit of the fund from which payment is to be made, each



Honorable Charles A. Sheehan

sufficient to meet the obligation incurred and unless the contract or order bears the certification of the accounting officer so stating; except that in case of any contract for public works or buildings to be paid for from bond funds or from taxes levied for the purpose it is sufficient for the accounting officer to certify that the bonds or taxes have been authorized by vote of the people and that there is a sufficient unencumbered amount of the bonds yet to be sold or of the taxes levied and yet to be collected to meet the obligation in cash there is not a sufficient unencumbered cash balance in the treasury. All contracts and purchases shall be let to the lowest and best bidder after due opportunity for competition, including advertising the proposed letting in a newspaper in the county with a circulation of at least five hundred copies per issue, if there is one, except that the advertising is not required in case of contracts or purchases involving an expenditure of less than five hundred dollars, in which case notice shall be posted on the bulletin board in the courthouse. It is not necessary to obtain bids on any purchase in the amount of one hundred dollars or less made from any one person, firm or corporation during any period of thirty days. All bids for any contract or purchase may be rejected and new bids advertised for. Contracts which provide that the person contracting with the county shall, during the term of the contract, furnish to the county at the price therein specified the supplies, materials, equipment or services other than personal therein described, in the quantities required, and from time to time as ordered by the officer in charge of purchasing during the term of the contract, need not bear the certification of the accounting officer, as herein provided; but all orders for supplies, materials, equipment or services other than personal shall bear the certification. In case of such a contract, no financial obligation accrues against the county until the supplies, materials, equipment or services other than personal are so ordered and the



Honorable Charles A. Sheehan

certificate furnished."

Section 50.760, RSMo 1959, which also deals with contracts in class two counties, is not applicable in this instance as this section has been construed to include the ordinarily foreseeable items to be used by the various county officials in the conduct of their offices and which may, by pooling purchases, be obtained at advantageous prices to the county. Language similar to Section 50.660, supra, has been interpreted in Layne--Western Company v. Buchanan County, 85 F. 2d 343, 346:

"The requirement of competitive bidding is always subject to qualification that the contract must be naturally competitive."

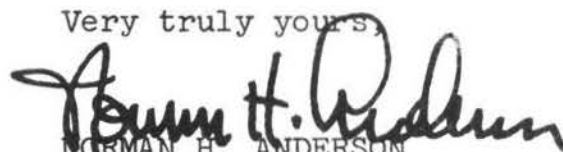
We have not found any Missouri cases directly in point. Therefore, we shall proceed on the theory based on the purposes intended by the legislature for requiring competitive bidding for public contracts. The reason for requiring competitive bidding is based upon public policy, that is, to benefit the public in the contract by obtaining the best result for the proposed contract at a reasonable cost. There are certain similarities in insurance rates, protection offered and stability of insurance companies, as most aspects of insurance are regulated by statutes or rules. However, this office has been informed by the Department of Insurance that premium rates may vary.

Therefore, we interpret Section 50.660, supra, as requiring competitive bidding as prescribed in said section, and further state that our opinion is that a county court of a second class county must comply with Section 50.660, supra.

#### CONCLUSION

The County Court of a second class county must comply with Section 50.660, RSMo 1959, and submit all contracts involving expenditures of \$500.00 or more for insurance on county property to the lowest and best bidder after due opportunity for competition.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

January 20, 1967



MEMORANDUM IN RESPONSE TO  
OPINION REQUEST NO. 452 (1966)  
65 (1967)

TO: HONORABLE THOMAS D. GRAHAM

FROM: NORMAN H. ANDERSON, Attorney General

RE: Can the building for the Jefferson City Library be financed by a long term lease with an option to purchase upon payment of a specified rental which is to be applied against the purchase price?

This memorandum is prepared to respond to your letter wherein you requested an opinion of this office whether or not a lease agreement by the Library Board extending over several years with an option to purchase would be legal. If so, could it be used by the Library to construct the Library Building? Rather than limit ourselves with the narrow issue presented by your letter, we propose to discuss the problem of financing the building in view of the comments made by Mr. James Davis to this office subsequent to receiving your letter.

Mr. Davis stated to us that his principal interest was how to finance the cost of the building now that the Board has acquired the land and that he was not interested particularly in the narrow question that he presented in his letter that he had written to you.

To directly answer the question of financing the building of the Library through a long term lease with an option to purchase, we direct your attention to our opinion, dated October 14, 1949, addressed to Mr. Paxton Price, wherein we held:

Honorable Thomas D. Graham

"We are further of the opinion that county library boards may not obtain buildings by the device of entering into a lease with an option to purchase upon payment of a specified purchase price with provision for application of rental paid in accordance with the lease upon the purchase price."

A copy of this opinion is attached for your information. We also are attaching Opinion No. 7, dated March 2, 1964, addressed to Honorable Bill D. Burlison, which may be of interest to you.

In our effort to be of assistance to you and the Library Board by making suggestions that you might explore, this office called Mr. Ichord, United States Representative for this District, to inquire if there were any Federal funds that might be available to help construct the Library Building. A copy of Mr. Ichord's letter is attached to this memorandum. It would appear that the Library Board might possibly be able to apply for matching funds up to the value of the land (not to exceed \$100,000) under Title 2 of the Library Services Act. It also appears that a non-profit corporation might possibly be eligible also for a long term, low interest loan from the "Community Facilities Administration", whose regional office is located in Fort Worth, Texas. The funds obtained from them could be used to finance the building. The details for applying to the agency are contained also in Mr. Ichord's letter.

To restate the factual situation, the land is presently owned by the Library Board. According to Mr. Davis, the Board may be able to arrange for a non-profit corporation to build the building on the land.

At this point we might suggest the Attorney for the Library Board consider such a lease between the corporation and the Library Board drawn and executed on an annual basis with a provision for a unilateral option for successive renewals on an annual basis.

Thus, if the Library Board could lease the bare land to the non-profit corporation then the corporation could build its building on the land. Subsequently, the corporation could lease the land and the building back on an annual basis to the Library Board (at a reasonable rental) until the corporation shall have recouped its money and cost. At that time, the corporation by the terms of the lease agreement could transfer all interest in the building of the non-profit corporation to the Library Board. The lease, of course, must contain a clause providing that when the rentals for the successive annual leases have equaled the cost of the building that the lessor will execute documents conveying all interest of the non-profit corporations to the Library

Honorable Thomas D. Graham

Board. We believe the distinction between this procedure and a long term lease is readily apparent.

We suggest a thorough study by the Library Board Attorney and utilization of all federal resources as may be available. If this is inadequate, it may be possible to utilize an annual lease renewable at the option of the Library Board on an annual basis for successive terms as discussed in the paragraphs above to raise the funds necessary to build the Library Building.

The comments we have made in the above paragraphs are submitted for your consideration solely as possible suggestions to afford you different avenues of approach to your problem. In the final analysis, the decisions are yours to make. We suggest finally that you consult in detail with your counsel.

The suggestions herein are merely suggestions and not a ruling by this office and are merely for the consideration of the Library Board and its Attorney.

NORMAN H. ANDERSON  
Attorney General

RCA:fb

Enclosures: Opinion No. 71, dated October 14, 1949, to:  
Mr. Paxton Price  
Opinion No. 7, dated March 2, 1964, to:  
Honorable Bill D. Burlison

NEPOTISM:  
PUBLIC OFFICERS:  
SCHOOLS:

School Board Member who votes to employ relative violates constitutional nepotism provision. Violator forfeits his office.

OPINION NO. 460<sup>68 - 1967</sup>

April 25, 1967

Honorable Lawrence O. Davis  
Prosecuting Attorney of  
Franklin County  
Union, Missouri



Dear Mr. Davis:

Your predecessor in office, Mr. William D. Kimme, made a request for an opinion, dated September 2, 1966. It is as follows:

"In March 1966, the Robertsville School Board voted to contract the secretarial services of a certain individual under a Federally sponsored program.

"The individual who was hired was a sister-in-law of one of the school board members.

"All six board members were present when a vote was taken on the hiring of this individual.

"The vote of the board at this meeting was four (4) for hiring, one (1) against, and one (1) member did not vote.

"Section 162.301 Missouri Revised Statutes provides that in order to enter into a contract, the majority of the board must vote affirmatively. This was accomplished as indicated.

Honorable Lawrence O. Davis  
Page 2

"It has been determined previously by your office in Opinion No. 75, May 15, 1953, that when a director of a Board of Education casts a necessary or deciding vote in favor of employment of any relative within the fourth degree, that member forfeits his office.

"In the matter under consideration here, the Board Member who was related to the individual hired was one of the four members, the majority, voting for the hiring.

"Based upon these facts it has been requested that I institute an ouster proceeding against said interested director on the basis that his vote was a necessary vote in this particular matter. The question which I present under these facts, and to which I respectfully request your opinion, is whether or not when an interested director votes for the hiring of a relative and his vote is one of the four votes cast, being a majority, along with one no vote, and one abstention, whether or not he has violated his office and is subject to ouster? Is the abstaining director's vote to be taken as a yes vote, thereby eliminating the question of the interested director's vote being 'necessary'? Has the interested director merely voted with the majority?"

Article VII, Section 6 of the Constitution of Missouri, 1945, provides that any public officer or employee who appoints or employs a relative shall forfeit his office. This Article is as follows:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."



Honorable Lawrence O. Davis  
Page 3

We discussed a similar situation, in Opinion No. 177, directed to Don E. Burrell, dated May 31, 1966. A copy of this opinion is attached hereto.

This opinion holds that a school director is a public officer as pertains to the above section of the Constitution and cites State ex rel vs. Whittle, 63 S.W.2d 100 as authority for so holding.

In the situation which you have presented here, the six member school board voted to employ the person in question on the following basis: Four members of the Board voted "yes"; a fifth voted "no" and the sixth abstained from voting. The director, whose sister-in-law was the prospective employee, voted "yes".

The opinion referred to in your letter (Opinion 75, May 15, 1953, to James T. Riley) cites the case of State ex inf. McKittrick vs. Whittle, 63 S.W.2d 101. The Whittle case holds (p.102):

"\* \* \* \* If at the time of the selection a member has the right (power), either by casting a deciding vote or otherwise, to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment. In this case it is admitted that respondent had such power at the time of the selection, and that he exercised it by naming and appointing his first cousin to the position of teacher of the school in said district."

It will be seen from a reading of the Whittle case that a director of a school board who casts a vote in favor of hiring an individual, to whom he is related violates the restrictions contained in the constitutional provision.

Under the law of this state and the provisions of the Constitution, the director's action in voting in favor of the hiring of his relative is an express and positive action and hence constitutes a violation, and would become subject to ouster.

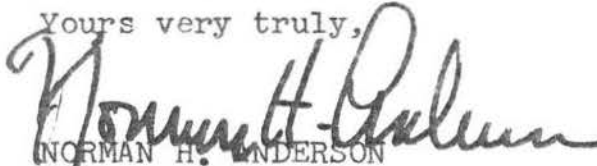
Honorable Lawrence O. Davis  
Page 4

CONCLUSION

It is, therefore, the opinion of this office that, where a member of a school board casts a vote for the employment of a relative, and said relative is within the fourth degree of consanguinity or affinity, he has violated the nepotism provision of the Constitution and could be removed from office.

The foregoing opinion which I hereby approve was prepared by my Assistant, O. Hampton Stevens.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

Encl.

CRIMINAL LAW: If one is charged with operating motor boat  
RECKLESS OR NEGLIGENT: in reckless or negligent manner so as to en-  
OPERATION OF MOTOR BOAT: danger life or property of any person, by  
A CRIME: WHEN: permitting one to ride on bow, while boat  
is operated; no criminal violation of  
Section 306.110 (1) RSMo 1959, would be alleged. In addition to such  
allegations, other facts must be given, specifically showing how motor  
boat was operated in reckless and negligent manner within meaning of  
said section, to sufficiently charge defendant with violation of same.

OPINION NO. 461 (1966)  
OPINION NO. 69

September 7, 1967

Honorable Paul Boone  
Prosecuting Attorney  
Ozark County  
Gainesville, Missouri 65655



Dear Mr. Boone:

This office is in receipt of your request for a legal opinion,  
which reads in part as follows:

"There has been reported to my office for  
prosecution the operator of a motor boat  
upon a lake in Ozark County, for operating  
the boat while another person was riding  
upon the bow of the boat; no other act of  
reckless or negligent operation of the boat  
is alleged.

"Would the act of operating a motor boat  
while a person is riding on the bow of the  
boat constitute reckless or negligent opera-  
tion of the boat under the provisions of  
Section 306.110 VAMS?"

Section 306.010 RSMo 1959, defines certain terms as used in  
the chapter, except in those instances where the context clearly  
indicates otherwise, among which are:

"(1) Motor boat, any vessel propelled by  
machinery whether or not such machinery  
is a principal source of propulsion, but  
shall not include a vessel which has a

Honorable Paul Boone

valid marine document issued by the Bureau of Customs of the United States or any federal successor thereto and shall not include a vessel powered by machinery having a rating of ten horsepower or less.

"(2) Operate, to navigate or otherwise use a motor boat or vessel.

\* \* \* \* \*

"(5) Waters of this state, any waters within the territorial limits of, this state that are navigable, except bodies of water owned by a person, corporation, association, partnership, municipality or other political subdivision, public water supply impoundments, and except drainage ditches constructed by a drainage district."

Although the opinion request does not specifically so state, that it refers to a "motor boat" operated, "upon waters of this state", within the meaning of said terms as defined by Section 306.010 supra, it is believed this was your intention and the opinion will be written on that basis.

Section 306.110 RSMo 1959, referred to in the opinion request, reads in part as follows:

"1. No person shall operate any motor boat or vessel, or manipulate any water skis, surfboard or similar device in a reckless or negligent manner so as to endanger the life, or property of any person."

Section 306.210 (2) RSMo 1959, provides the penalty that shall be inflicted for a violation of Section 306.110 and reads:

"2. Any person who violates any of the provisions of Section 306.110 shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by a fine of not more than five hundred dollars, or by a term of imprisonment in the county jail of not more than six months or by both the fine and imprisonment for each violation."

Honorable Paul Boone

Apparently your inquiry is concerned with the proposition as to whether or not a defendant can be (sufficiently) charged with a criminal offense, and a violation of Section 306.110 (1) supra, from the facts given in the opinion request. If he is alleged to have operated a motor boat upon certain waters of the State of Missouri, at a certain time and place, in a reckless or negligent manner, so as to endanger the life or property of another person, by allowing a person to ride as a passenger upon the bow of such motor boat at the time it was then and there being operated by the defendant, would this allegation be a sufficient description of an act constituting a crime within the meaning of Section 306.110 (1)? Such an allegation would be in the language of the section, but it would not necessarily be sufficient unless the section defined the crime of reckless or negligent operation of a motor boat, and the essential elements of such crime.

The general rule that a criminal charge framed in the language of the statute is sufficient, applies only where the statute describes the entire offense by setting out the facts constituting it, as held in *State v. Maher*, 124 S.W.2d 679.

The information in the case of *State v. McNail*, 389 S.W.2d 214, alleged careless and reckless driving, in violation of Section 304.010 (1), (5) RSMo 1959, and was attacked by the defendant, who contended it charged no criminal offense. The court found the information to be sufficient, but in passing upon defendant's contentions, said at l.c. 217-218:

"Informations comparable to this one have been the subject of critical discussion \* \* \*. This criticism is based upon the general rule of criminal pleading that an information charging a statutory crime may be couched in the language of the statute, if the statute itself sets forth the constituent elements of the offense; but if the statute merely defines the crime in generic terms, then the constituent facts must be pleaded in enough detail to advise the defendant specifically what he must defend against \* \* \*. The offense of careless and imprudent driving is only very broadly defined by Section 304.010, par. 1, and an information charging that offense by reciting the bare language of the statute in negative form is generally held to be insufficient \* \* \*. We have the view, however, that the rule requiring pleading of the constituent circumstances in the information, where the statute denounces the offense only

Honorable Paul Boone

in generic terms, may easily be overstated when dealing with traffic offenses \* \* \*. The information first filed in the Circuit Court might easily have been more clearly and specifically drafted, but it does charge the defendant with having driven a specific automobile at a specific time and place in a careless and reckless manner by failing to drive to the right. The information does not merely allege the offense by reciting the bare words of the statute, but adds that the offense was committed by failing to keep on the proper side of the road or in the proper place\* \* \*."

Again, in the case of State v. McCloud, 313 S.W.2d 177, it was held that general charges of wrongfully, wilfully and unlawfully driving an automobile in a careless, reckless and imprudent manner were mere conclusions of law and unless specific charges were stated with legal sufficiency, an information based on these charges would be insufficient.

As indicated above, if one were charged with operating a motor boat upon designated waters of Missouri, at a certain time and place, in "a reckless or negligent manner so as to endanger the life, or property of another", by allowing a person to ride as a passenger upon the bow of the motor boat at the time it was then and there being operated by the defendant, such an allegation, especially the quoted portion, would be in the language of Section 306.110 (1) supra, but no violation of the section would be alleged. Said section does not define, nor state what the essential elements of the crime of reckless or negligent operation of a motor boat shall consist of.

In view of the holdings in the above cited cases, such an allegation would be merely a conclusion of law. While the statutory language of Section 306.110 (1) may be used in the charge, such language in and of itself is insufficient to describe the offense, and for the reasons given in above cited cases, the charge must go further in describing the offense and state additional facts in clear and concise language, the specific acts and circumstances surrounding such acts, constituting the reckless and negligent operation of the motor boat. Allowing another to ride on the bow of a motor boat, without any further statement of facts, would not charge a violation of Section 306.110 (1), but if other facts were alleged, such as allowing one to ride on the bow of his motor boat thereby obstructing the view ahead, so that the operator could not get a clear view of the waters ahead to sufficiently steer his boat



Honorable Paul Boone


in a proper manner, this would undoubtedly be reckless or negligent operation of the boat within the meaning of the statute. In view of the foregoing, our answer to the inquiry of the opinion request is in the negative.

CONCLUSION

Therefore, it is the opinion of this office that if one were charged with operating a motor boat in a reckless or negligent manner so as to endanger the life or property of any person, by permitting a person to ride as a passenger upon the bow of said boat, while it was being operated at a certain time and place, upon designated waters of the state, no criminal offense in violation of Section 306.110 (1) RSMo 1959, would be alleged. In addition to such allegation, other facts must be alleged specifically showing how the motor boat was operated in a reckless or negligent manner so as to endanger the life or property of another person, within the meaning of such terms as used in said statute, to properly charge the defendant with a violation of such statute.

The foregoing opinion which I hereby approve was prepared by my assistant, Paul N. Chitwood.

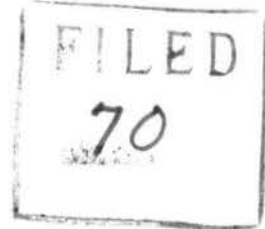
Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

OPINION NO. 70  
Answer by Letter (Randolph)

May 23, 1967

Honorable Lawrence O. Davis  
Prosecuting Attorney  
Franklin County  
Union, Missouri



Dear Mr. Davis:

This letter is in response to a request from your predecessor for an official opinion of this office on the question of whether the county court has authority to withhold wages from county employees to pay a premium for a voluntary group hospitalization program.

The powers of county courts are limited to such powers that are granted by the Constitution or Statutes of Missouri, expressly or by necessary implication.

There is no provision in the Missouri Constitution or Statutes for payroll deductions by county courts for county employees to pay premiums for a group hospitalization program. Thus, there is no legal authority for the county court to withhold wages from the paychecks of employees for a voluntary group hospitalization program.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

DLR:df

OPTOMETRY:  
PHYSICIANS:  
GLASSES:

Prescription glasses may be sold or dispensed to the individual who will wear the glasses or anyone of his choosing, and wholesale optical suppliers or manufacturers

are not required to furnish such glasses pursuant to an individual prescription only to licensed optometrists and physicians. Preparing a prescription for corrective glasses constitutes the practice of optometry as defined in Section 336.010, RSMo, and such a prescription may not be altered or changed in any manner that would affect the corrective properties of the lens by anyone other than a licensed optometrist or physician.

OPINION NO. 77  
(494 - 1966)

July 25, 1967



Mr. James R. Warrick, O. D.  
Office of the President  
Missouri State Board of Optometry  
P. O. Box 633  
Columbia, Missouri 65201

Dear Dr. Warrick:

This is in answer to your request for an opinion of this office which reads as follows:

- "1. Does the ordering of prescription lenses from a laboratory or the altering of a prescription of a licensed optometrist or physician for the purpose of such ordering by a safety director, or lay person, constitute the unlawful practice of optometry?
- "2. Is it unlawful for a wholesale optical supplier or manufacturer to furnish, sell, or dispense prescription glasses pursuant to an individual prescription to the Safety Director or anyone other than a licensed optometrist and/or physician?"

Section 336.020, RSMo, makes it unlawful for any person to practice optometry or attempt to practice optometry without a certificate of registration as a registered optometrist issued by the State Board of Optometry. The scope of the practice of optometry is defined in Section 336.010, RSMo, as follows:

"(1) The examination of the human eye, without the use of drugs, medicines or surgery, to ascertain the presence of defects or abnormal conditions which can be corrected by the use of lenses, prisms or ocular exercises.

"(2) The employment of objective or subjective mechanical means to determine the accommodative or refractive states of the human eye or the range of power of vision of the human eye.

"(3) The prescription or adaptation without the use of drugs, medicines or surgery, of lenses, prisms, or ocular exercises to correct defects or abnormal conditions of the human eye or to adjust the human eye to the conditions of special occupation. No registered apprentice may independently practice optometry. A registered apprentice may, however, under the immediate personal supervision of a registered optometrist, assist a registered optometrist in the practice of optometry."

Although examining the eye and preparing a prescription for glasses is part of the practice of optometry, preparing the lenses in accordance with the prescription and the sale of prescription glasses is not. *Ketring v. Sturges*, Mo.Sup., 372 S.W.2d 104. A prescription prepared by an optometrist or physician is the property of the patient and he may have it filled by himself or by anyone he chooses including the "safety director" of a plant or a school. Nothing in Section 336.010 or any other statute requires a wholesale optical supplier or manufacturer to furnish, sell or dispense prescription glasses ground to an individual prescription only to a licensed optometrist or physician. Such glasses may be ordered by or furnished to the individual who is to wear the glasses or anyone of his choosing.

However, a prescription may not be altered by anyone other than a registered optometrist or licensed physician in any manner which would change the corrective properties of the lenses. The prescribing of lenses to correct defects or abnormal conditions of the eye is a part of the practice of optometry and any alteration or change may be made only by an authorized practitioner.

#### CONCLUSION

Prescription glasses may be sold or dispensed to the individual who will wear the glasses or anyone of his choosing, and wholesale optical suppliers or manufacturers are not required to furnish such glasses pursuant to an individual prescription only to licensed optometrists and physicians.

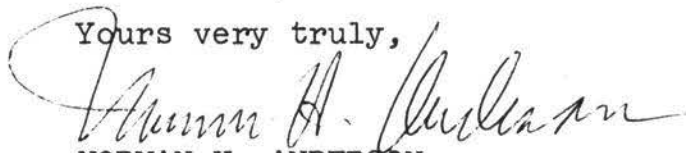
Mr. James R. Warrick, O. D.

-3-

Preparing a prescription for corrective glasses constitutes the practice of optometry as defined in Section 336.010, RSMo, and such a prescription may not be altered or changed in any manner that would affect the corrective properties of the lens by anyone other than a licensed optometrist or physician.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman

Yours very truly,

A handwritten signature in cursive script, appearing to read "Norman H. Anderson".

NORMAN H. ANDERSON  
Attorney General

ROAD DISTRICTS:  
COUNTIES:  
COUNTY COURTS:  
ROADS:

It is illegal for a special road district to repair or improve any private roads even though the cost is paid for by the owner.

OPINION NO. 78  
495 (1966)

March 16, 1967

Honorable Byron L. Kinder  
Prosecuting Attorney of  
Cole County  
Jefferson City, Missouri



Dear Mr. Kinder:

This opinion is prepared to respond to your recent request whether it is illegal for a special road district formed under Chapter 233 RSMo., 1959, to repair or improve roads located on private property when the cost is paid for by the owner, when the owner is also a commissioner of the road district.

The County Clerk of Cole County has advised this office that the special road district involved is an "eight-mile road district". The provisions of Sections 233.070 and 233.085 RSMo., 1959, establish the authority of the board of the district over the equipment belonging to the district.

There are two opinions that have been issued by this office that should be considered with your question. Opinion No. 4, dated December 9, 1966, addressed to the Honorable W. L. Evans, Jr., holds that a county court is not authorized to contract with a private person for the maintenance of a private road (opinion attached).

Opinion No. 63, dated February 16, 1954, addressed to the Honorable Garner L. Moody, holds that a township has no authority to use township machinery to do work for private individuals for hire (opinion attached). These opinions are attached for your information inasmuch as they explain the principles that are involved in answering your question.



Honorable Byron L. Kinder - 2 -

The Missouri Supreme Court in Miller v. Ste. Genevieve County, 358 S.W.2d 28, 1.c. 30, had this to say on a similar case involving the authority of the county to expend money obtained by taxes on the improvements of a private road:

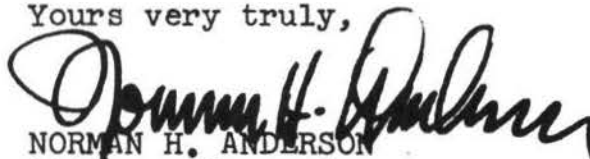
"Although the allegations in Count II are brief, they clearly set forth the contention that Ste. Genevieve County and the members of the county court have spent and are proposing to spend public money obtained by taxes in the improvement of a privately owned road. If this is true the expenditures are illegal."

#### CONCLUSION

We conclude, therefore, that it is illegal for a special road district organized under Chapter 233 to repair or improve any private roads even though the cost of such repair may be paid for by the owner.

The foregoing opinion which I hereby approve was prepared by my assistant, Richard C. Ashby.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

NINE-HOUR LAW:  
MISSOURI FAIR EMPLOYMENT  
PRACTICES ACT:  
WOMEN EMPLOYEES:

The Missouri Fair Employment Practices  
Act does not negate nor supplant the  
Nine-hour Law and related statutes.

NOTE: This opinion when sent out  
should always be accompanied  
by Op. No. 231 - 1971.

OPINION NO. 82  
(504 - 1966)

January 31, 1967

Honorable William Baxter Waters  
State Senator - 17th District  
Missouri Senate - Majority Floor Leader  
First National Bank Building  
Liberty, Missouri



Dear Senator Waters:

This is in response to your recent request for an official  
opinion of this office.

The question posed in your letter deals with the potential  
conflict among existing Missouri statutes with respect to indivi-  
dual employment opportunities between the sexes.

The Sections involved include the so-called Nine-hour Law  
which is Section 290.040, Section 292.040 which prohibits minors  
and women from working around certain types of machinery, Section  
293.060 which specifies that women shall not be employed in or about  
mines and Section 564.680 which specifies that no girl under the age  
of 18 years shall be permitted to be engaged in carrying telegraphic  
dispatches or in the messenger service. (All of the foregoing are  
RSMo., 1959)

The seeming inconsistency between the foregoing Missouri Statu-  
tes and the Missouri Fair Employment Practices Act can be resolved  
through interpretation of paragraph 8 of Section 296.020 RSMo., 1965  
Supp., which reads in part as follows:

"(8) Notwithstanding any other provision of this  
chapter, it shall not be an unlawful employment  
practice because of sex to differentiate in em-  
ployment, compensation, terms, conditions or  
privileges of employment between male and female  
employees if such differences are otherwise re-  
quired or permitted by the laws of this state, or  
by the provisions of Section 703 of the federal  
Civil Rights Act of 1964, as amended, or by the  
provisions of Section 6(d) of the federal Fair  
Labor Standards Act of 1938, as amended; . . ."

The foregoing paragraph 8, clearly states that if differentiation on the basis of sex is required by state law it is not an unlawful employment practice. Prior opinions of this office have given a restrictive interpretation to the nine-hour law, and in view of such restrictive interpretation it is clear that the nine-hour law does not conflict with the Missouri Fair Employment Practices Act. Chapter 296 RSMo., 1965 Supp., prohibits discriminatory treatment based upon sex in employment matters, but also expressly recognizes that special treatment based on sex in regard to employment is not to be considered discriminatory if other laws require or permit it. The Missouri statutes mistaken by some to be in conflict with the Missouri Fair Employment Practices Act are not drafted so as to be discriminatory towards women. On the contrary these laws are designed to protect women. Hence women are not being provided with unequal treatment but rather they are given special treatment. This special treatment is not inconsistent with the provisions of paragraph 8, Section 296.020 RSMo., 1965 Supp.

Therefore, if a woman is refused employment, promotion or overtime work because the job is one of the types covered by Sections 290.040, 292.040, 293.060, or 564.680 RSMo., 1959, in industries covered by those laws and in fact the employment would run contrary to the terms of those laws the employer will not have violated the Missouri Fair Employment Practices Act.

It must be clearly understood that the laws hereinbefore mentioned must be the real reason for denial of the employment opportunity and it is our understanding that the Human Rights Commission contemplates close examination of each situation in order to determine that the employment is in fact covered by said laws.

Early in this opinion it was mentioned that prior Attorney Generals' opinions narrowly construed the nine-hour law. Such narrow construction facilitates the satisfaction of the requirements of the potentially conflicting statutes considered in this opinion. A brief review of these opinions is in order at this time. It is to be noted that our research uncovers no Missouri court decisions interpreting the language of the nine-hour law. The establishments to which Section 290.040 RSMo., 1959, applies are:

" . . . any manufacturing, mechanical, or mercantile establishment, or factory, workshop, laundry, bakery, restaurant, or any place of amusement . . . or by any person, firm or corporation engaged in any express or transportation of public utility business, or by any common carrier, or by any public institution, incorporated or unincorporated, . . . "

In a previous opinion of this office dated February 6, 1940 to Mr. Earl Shackelford, Commissioner of Labor dealing with the term "mercantile establishments" it was concluded that a nursery did not come within the definition of a mercantile establishment merely because it sold produce. In a letter from the Attorney General dated

Honorable William Baxter Waters

August 21, 1941 to Mr. George N. Davis, Prosecuting Attorney of Macon County, this office advised that female employees of a hotel did not fall within the purview of the nine-hour law because a hotel would not come within the meaning of a factory, workshop, bakery, place of amusement, manufacturing or mercantile establishment.

In an opinion dated April 17, 1953 to Mr. L. L. Duncan, Director, Division of Industrial Inspection, this office stated that female employees of state hospitals in Missouri did not come within the provisions of Section 290.040.

This office ruled in a letter dated July 25, 1951 to Mr. L. L. Duncan, Director, Division of Industrial Inspection, that Section 290.040 does not apply "... to industrial nurses employed by manufacturing and mercantile establishments, where the work done by such nurses is to render first aid work, render professional service of medical or surgical nature under the direction of a physician, and maintain medical and clerical records."

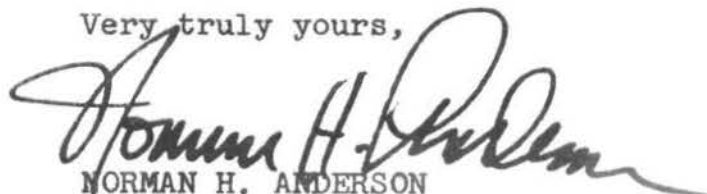
It is clear from the foregoing mentioned opinions that this office has consistently taken a restrictive approach towards Section 290.040 the so-called nine-hour law. It is our opinion that the legislature was not unaware of the restrictive opinions of this office at the time the Missouri Fair Employment Practices Act was enacted. By specifically excepting differentiations in employment as required or permitted by the laws of this state from Chapter 296 RSMo., 1965, the legislature intended for the pre-existing law regarding the protection of employed females to go unaltered.

#### CONCLUSION

Therefore it is the opinion of this office that Chapter 296, RSMo. 1965, does not negate nor supplant the provisions of Section 290.040, 292.040, 293.060, and 564.680, RSMo., 1959.

The foregoing opinion of which I hereby approve was prepared by my Assistant, Mr. Jerome Wallach.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

OPINION NO. 83 (1967)  
Opinion No. 507 (1966)  
Answered by Letter (Mansur)

March 29, 1967

Honorable Lem T. Jones, Jr.  
State Senator  
Tenth District - Jackson County  
100 Waltower Building  
Kansas City, Missouri 64106



Dear Senator Jones:

In your letter of October 28, 1966, you enclosed a copy of Section 1484, p. 380, Laws of New York, which statute prohibits the wearing of uniforms similar to that worn by the military and other officials or semi-official forces of foreign countries and requested an opinion from this office as to the constitutionality of such a statute if enacted in this state.

This statute amended a former statute dealing with the same subject in the State of New York, and as amended, became effective September, 1966. We have been unable to find any appellate court decisions in New York passing on the validity of this statute. We have also been unable to find any appellate court decisions in any other state passing on the constitutionality of a similar statute. At the present time, we do not have any statute in this state similar to the one under consideration.

When the constitutionality of a statute is in question, the invalidity of the law must appear beyond a reasonable doubt before the Supreme Court of this state will pronounce it void. There is likewise a presumption indulged in the favor of its constitutionality by the courts of this state. In the past, this office has followed this rule of interpretation. Unless the statute is clearly in conflict with the express conditions of our constitution, we consider the act constitutional until the court rules otherwise. Since the validity of this statute under consideration

Honorable Lem T. Jones, Jr.

has not been passed upon by an appellate court, it does not conflict with any express provisions of our constitution, we would consider the statute constitutional in this state at the present time.

If you have any further questions, please advise.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General



February 21, 1967



OPINION NO. 84 (1967)  
Answered by Letter  
(Chitwood)

Honorable Fielding Potashnick  
Prosecuting Attorney  
Scott County  
Benton, Missouri

Dear Mr. Potashnick:

This office is in receipt of your request for a legal opinion, reading as follows:

"I would like an official opinion on the following question:

"The assessed valuation of Scott County in the year 1965 was \$49,200,000.00; the assessed valuation in said county in 1966 is \$52,000,000.00. Under the provisions of Section 481.200, does the salary of the Probate Judge of Scott County, elected in 1966 and taking office in 1967 go up to \$9,000.00?"

Section 481.200 (1) RSMo. Cum. Supp., 1965, fixes the salary of probate judges in certain counties and reads as follows:

"The annual salary of probate judges in counties now or hereafter having more than thirty thousand and less than sixty-five thousand inhabitants shall be as follows:

Honorable Fielding Potashnick

(1) \* \* \* \*

(2) In counties with an assessed valuation of more than twenty million dollars and less than fifty million dollars, the sum of seven thousand eight hundred dollars;

(3) In counties with an assessed valuation of more than fifty million dollars, the sum of nine thousand dollars.

2. For the purpose of this section, the assessed valuations of all property in the respective counties, as last determined by the commission or other body provided by law for the equalization of taxes as between the counties next prior to the year for election of judges, shall be deemed to be the assessed valuation for the ensuing terms of such judges."

Scott County had a population in 1960 of 32,748 and since Section 481.200 RSMo. Cum. Supp., 1965 provides a method for determining the salary of the probate judge in counties now having or hereafter having more than 30,000 and less than 65,000 inhabitants, the section is applicable to said county.

Section 481.200, Paragraph 2, supra, provides that for the purpose of arriving at the amount of the salary the probate judge shall receive in any of such counties, the assessed valuation of all property therein, as last determined by the commission or other body provided by law for equalization of taxes as between the counties next prior to the year for election shall be deemed to be the assessed valuation for the ensuing term of such judge.

It appears that in equalizing the taxes among the various counties under Section 138.390 RSMo., 1959, the records of the state tax commission show that the assessed valuation of Scott County for 1965 was \$49,226,013.00.

Honorable Fielding Potashnick

It further appears that 1965 was the year "next prior to the year for the election of such judges" within the meaning of said term as used in Section 481.200, Paragraph 2, supra. Consequently, the assessed valuation for 1965 is the one to be used in determining the salaries of probate judges elected in 1966 for the ensuing term, beginning in 1967.

Section 481.200 (1) sub-paragraph 3, provides that in counties with an assessed valuation of more than fifty million dollars, the salary of the probate judge shall be nine thousand dollars per year. However, Scott County did not have an assessed valuation of more than fifty million dollars in 1965, but had an assessed valuation of less than fifty million dollars or \$49,226,013.00 for 1965, hence said Section 481.200 (1) sub-paragraph 3, has no application to Scott County.

Section 481.200 (1) sub-paragraph 2, provides that in counties with an assessed valuation of more than twenty million dollars and less than fifty million dollars, the salary of the probate judge shall be seven thousand eight hundred dollars. It is noted the assessed valuation of Scott County for 1965 falls within the graduated scale of tax assessments, provided by said sub-paragraph 2. Therefore, in view of these statutory provisions, and the fact that the assessed valuation of Scott County for 1965, the year next prior to the election of probate judge in such county in 1966, the judge thus elected, whose term began in 1967, shall receive a salary of seven thousand eight hundred dollars per annum for the ensuing term.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

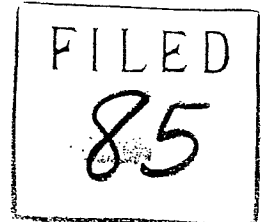
PNC:fb

TAXES:  
AGRICULTURE:  
DEPARTMENT OF AGRICULTURE:  
NOXIOUS WEED LAW:

MAR 3 0 1967

OPINION NO. 85  
(509 1966)  
Answered by Letter  
(Downey)

Honorable Dexter D. Davis  
Commissioner of Agriculture  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. Davis:

Reference is made to your request for an official opinion from this office stated as follows:

"A committee working on a revision of the Missouri Noxious Weed Law has recommended that to finance the enforcement of the act that a 3% assessment be charged against all herbicides sold in the state. Is such an assessment in conflict with any existing statutes?"

By oral conference you have clarified the statement of the question to the effect that the proposed statute will provide for an assessment of 3 per cent on the gross sales of all herbicides sold in the state.

Article X, Section 1 of the Constitution provides that the taxing power may be exercised by the General Assembly for state purposes. Article X, Section 4 (a), specifically declares that the constitutional provisions shall not prevent the taxing of franchises, privileges or incomes, or the levying of excise or motor vehicle license taxes, or any other taxes of the same or different types. In State ex rel. Missouri Portland Cement Co. v. Smith, 90 S.W.2d 405, the Court, in construing the constitutional provisions relating to taxes, stated that the power of the Legislature in matters of taxation for public purposes is

unlimited except insofar as restrained by the State or Federal Constitutions or by inherent limitations on the power to tax. The Court further defined excise taxes as including every form of charge imposed by public authority for the purpose of raising revenue upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation. The Court further stated that if the amount of a tax is measured by the amount of business done or the extent to which the conferred privileges have been enjoyed or exercised by the taxpayer, irrespective of the nature or value of the taxpayer's assets, it is regarded as an excise. In *General American Life Insurance Co. v. Bates*, 249 S.W.2d 458, the Court cited with approval *State ex rel. Missouri Portland Cement Co. v. Smith*, *Supra*, and further stated that excises are valid as revenue measures if they operate alike upon all within the same class of subjects.

Herbicide is defined by Section 263.270 (6), as follows:

"The term 'herbicide' means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any weed;"

If it may be assumed that the control of noxious weeds, and the supervision and regulation of herbicides incidental thereto, is a lawful subject for legislative action, revenue for such legislative purpose may be provided for pursuant to Article X, Section 1, of the Constitution. The proposed assessment of 3 per cent upon the gross sales of herbicides constitutes an excise tax pursuant to *State ex rel. Missouri Portland Cement Co. v. Smith*, *supra*, and *General American Life Insurance Co. v. Bates*, *supra*, and such taxes are permissible pursuant to Article X, Section 4 (a), of the Constitution.

Chapter 144, RSMo, provides for a sales and use tax in the amount of 3 per cent of gross receipts. Section 144.030 (2), RSMo Cum. Supp. 1965, declares a legislative intention to avoid double taxation under the provisions of Chapter 144, and pursuant to said intention certain exemptions are made from the sales tax. These exemptions include spray materials which are to be used for spraying growing crops, fruit trees and orchards when the harvested product thereof will be sold at retail. It may be that some or all of the herbicides in question enjoy the referenced exemption. Nevertheless, it remains a question of legislative policy as to whether or not the excise tax in question is to be levied. The Supreme Court has stated that double taxation is not favored and is not to be presumed; *Wood v. Deuser*, 164 S.W.2d 303. However, the

Honorable Dexter D. Davis  
Page 3

Courts of this state do not appear to have condemned double taxation per se.

It is noted that the Legislature frequently provides that the expenses for administering laws applicable to a particular industry will be recovered from the supervised or regulated industry. Thus, Section 339.070, RSMo 1959, provides that the expenses of administering the Real Estate License Law shall be provided from fees and charges against the licensed persons, corporations and associations. Section 411.150, RSMo Cum. Supp. 1965, provides that the expenses of administering the Grain Warehouse Law shall be provided from fees collected for services rendered under the law. Section 386.370, RSMo Cum. Supp. 1965, provides that the expenses attributable to the regulation of public utilities shall be provided by an assessment not to exceed 8/100 of 1 per cent of the gross operating revenues of the regulated utilities. Many other examples could be cited. It is specifically noted that the assessment provided for in Section 386.370 is an excise in the form of a per cent of gross operating revenues and as such it is analagous to the proposed assessment of 3 per cent of gross sales.

It is my opinion that the legislature may lawfully impose excise taxes for the administration and enforcement of the Noxious Weed Law.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General



August 9, 1967



OPINION NO. 86(1967)  
510(1966)  
Answered-by-letter (McFadden)

Honorable Charles H. Baker  
Prosecuting Attorney  
Dunklin County  
Kennett, Missouri

Dear Mr. Baker:

This is in reply to your request for advice concerning a charge under the Habitual Criminal Act in view of the unusual nature of the previous convictions in Arkansas of the people you propose to charge.

You have forwarded a copy of the Arkansas judgment against one of these people (Leland Miller) wherein it is indicated that he was sentenced to a term of ten years in the Arkansas State Penitentiary for "charges of burglary" and " \* \* \* such sentence to be suspended during his good behavior \* \* \* ".

The question presented is: Will the quoted judgment qualify as a prior offense under Section 556.280, RSMo 1959, which requires in part that the individual " \* \* \* shall be sentenced and subsequently placed on probation, paroled, fined or imprisoned \* \* \* ? "

You inquire if State v. Gordon, 344 SW2d 69, may have some bearing. In that case "imposition" of sentence was suspended on the prior conviction and the Missouri Supreme Court held that the Habitual Criminal Act did not apply because no sentence was actually meted out and therefore the requirement of the law had not been met.

It is the view of this office, however, that the individual in this case has been placed on probation under the Arkansas Statutes. It is true, that in this case there was a plea of nolo contendere and not a plea of guilty but sentence in this case was passed and "suspended" under provisions of Section 43-2324, Arkansas Statutes, Official Edition 1964, Replacement.

Honorable Charles H. Baker

We are advised by Howard A. Mayes, Deputy Prosecuting Attorney for the Second Judicial Circuit of Arkansas, that the effect of the sentence passed relative to this individual is that "the court may, at any time during the period of suspension, revoke the suspension for any conduct which the court deems not to be 'good behavior'... Arkansas does not have probation in the same sense that most states do and it is usually reserved to action by the Pardon and Parole Board and our [Arkansas] probation is considered as a form of parole."

It can be seen, therefore, that when a person is given a "suspended sentence" conditioned upon good behavior under Arkansas Statute 43-2324, he has been placed on probation as such term is used in Section 556.280, supra. Such section provides that when a plea of guilty has been accepted or a verdict of guilty rendered, the judge can postpone the pronouncement of final sentence and judgment upon such conditions as he shall determine proper and reasonable as to probation, restitution of the property involved and payment of the costs. In the present judgment, restitution was required as was payment of court costs and the individual was placed on probation by the setting out of the requirement of "good behavior."

By the terms of such section, the individual was placed on probation as the term is used by our courts and such judgment would, therefore, authorize a filing of an information in this state under the Habitual Criminal Law.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

HLM:ag

OFFICERS: By virtue of Article XIV, Section 9, Missouri  
CONSTITUTIONAL LAW: Constitution, it is unlawful for a person to  
hold the position of member or alternate member of a County Agricultural Stabilization  
Committee Board and at the same time hold the office of collector,  
trustee or assessor of a township in this state.

OPINION NO. 89  
(520, 1966)

February 14, 1967

Honorable Carl D. Gum  
Prosecuting Attorney for Cass County  
Harrisonville, Missouri 64701



Dear Mr. Gum:

This is in answer to your request for an opinion of this office concerning the question whether a person can legally serve as a township collector, trustee or assessor at the same time he is serving as a member of the County Agricultural Stabilization Committee Board. In a subsequent communication with this office, you requested that the opinion ought to cover alternate members as well as regular members of the County Agricultural Stabilization Committee Board. You have stated that this office has furnished you with eight former opinions of the Attorney General on related subjects.

We believe that Opinion No. 89 to Honorable D. D. Thomas, Jr., dated September 16, 1942, copy enclosed, holding that a township officer cannot hold office for profit under the United States, furnishes the basis for the answer to your inquiry. Said former opinion, taken in connection with Opinion No. 46 to Mrs. Lee Johnston, dated November 8, 1945, also enclosed, reveals that the only question in your case is whether the position of County Agricultural Stabilization Committeeman, or alternate, is an office of profit under the United States.

Pursuant to Acts of Congress, 16 U.S.C.A. 590, the various County Agricultural Stabilization Committees are elected, each member for a three year term, by the farmers in the counties, or by their representatives. Pursuant to regulations issued by the Secretary of Agriculture of the United States under the authority of said statute, such boards are clothed with governmental authority, in that they allot to farmers within their jurisdiction permissible acreage for the planting of various crops, determine the allocation of land to the soil bank, and set various allowances of federal money to various landowners for performing certain services, such as creating ponds, levees and erosion controls, as well as payments for fertilizers and soil conservation equipment.

Honorable Carl D. Gum

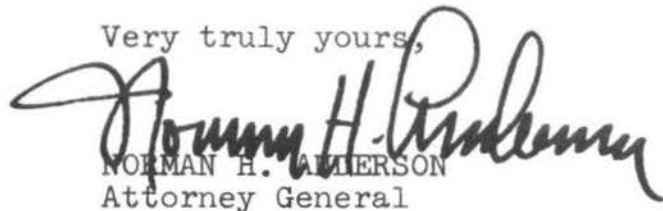
Inasmuch as the township offices mentioned in your opinion request; that is, collector, trustee, and assessor, are offices of profit in this state; and inasmuch as the position of County Agricultural Stabilization Committeeman or alternate is an office of profit under the United States (you have informed us and we have independently determined that these persons are paid by the government of the United States) it must follow that a person who holds any of such township offices and at the same time serves as a duly elected and qualified member of the County Agricultural Stabilization Committee Board, or an alternate thereof, is in violation of Section 9, of Article XIV, of the Missouri Constitution.

CONCLUSION

It is the opinion of this office that by virtue of Article XIV, Section 9, Missouri Constitution, it is unlawful for a person to hold the position of member or alternate member of a County Agricultural Stabilization Committee Board and at the same time hold the office of collector, trustee, or assessor of a township in this state.

The foregoing opinion, which I hereby approve, was prepared by my Assistant Donald L. Randolph.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

CHAUFFEUR LICENSE:  
COMMERCIAL VEHICLES:  
DRIVERS LICENSE:  
MOTOR VEHICLES:  
MOTOR VEHICLE LICENSE:

A van-type vehicle designed to accommodate eight people and regularly used as a courtesy car by motels to transport not more than eight guests to and from the airport is not a "commercial vehicle" as defined in Section 301.010 (1) RSMo 1959, and is not required to be licensed as such.

An employee of a motel which regularly uses these vehicles for such purpose is acting as a chauffeur as defined in the second classification of Section 302.010 (3) RSMo Supp., 1965, and may be prosecuted for a misdemeanor if he so operates such a vehicle without possessing a valid chauffeur's license.

OPINION NO. 95

June 6, 1967

Honorable Thomas A. David  
Director of Revenue  
Department of Revenue  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. David:

This is in answer to your request for an official opinion of this office on the questions raised in the letter from Colonel Raymond W. Hensley, Superintendent of Police, St. Louis County, which reads as follows:

"As a result of many motels located within the unincorporated area of St. Louis County now using a wide variety of van-type vehicles as courtesy cars for transporting passengers to and from the airport to their respective locations, this Department respectfully requests an opinion as to the type of license required for these vehicles.

To further clarify these vehicles, they are described as Ford Falcon Club Wagons, Chevrolet Suburban Custom Sport Vans or Chevrolet Sport Van Deluxe, all designed to accommodate eight persons. These vehicles normally carry some type of lettering pertaining to the particular organization operating them. Most are licensed as passenger automobiles and we are wondering if they are required to have a truck plate.

In connection with the operation of the aforescribed vehicles, we would further like an opinion as to what type license

is required by the operators. Is an operator's license sufficient, or must they have in their possession a chauffeur's license? Most of the drivers are not specifically assigned to this particular type operation, but do it as a supplement to their normal job at the motel, such as bus boy, door man, or in some cases even a maintenance man."

Discussing first the question of whether an operator driving these van-type vehicles is required to have a valid chauffeur's license, Section 302.020, RSMo 1959, provides:

"It shall be unlawful for any person to:

"(1) Drive as a chauffeur any vehicle upon any highway of this state unless such person has a valid license as a chauffeur under the provisions of this chapter, \* \* \*"

A chauffeur is defined in paragraph (1) of Section 302.010, RSMo Supp., 1965, as:

"(1) 'Chauffeur', an operator who operates a motor vehicle in the transportation of persons or property, and who receive compensation for such services in wages, salary, commission or fare; or who as owner or employee operates a motor vehicle carrying passengers or property for hire; or who regularly operates a commercial motor vehicle of another person in the course of or as an incident to his employment, but whose principal occupation is not the operating of such motor vehicles;"

Section 302.010 (1) provides three definitions, each containing a different criteria for determining whether the operator of a motor vehicle should be classified as a chauffuer. These classifications are separate and distinct and an operator may be classed as chauffeur if he qualifies under any one of them.

The second definition is "an operator \* \* \* who as owner or employee operates a motor vehicle carrying passengers or property for hire." It is clear that an employee of a motel who operates a motor vehicle carrying guests to and from the



airport is one, who acting as an employee, operates a motor vehicle carrying the passengers. The only question is whether these vehicles are being operated for hire within the meaning of the statute.

In determining the meaning and application of the provisions of the statute to the question presented, we should ascertain the legislative intent from the words used if that is possible, and in so doing give to such words their plain and ordinary meaning so as to promote the object and manifest purpose of the statute. *Baker v. Brown's Estate*, Mo. Supp., 294 S.W. 2d 22, 25. See *City of Kirkwood v. Allen*, Mo. Banc., 399 S.W. 2d 30, 36.

The purpose of statutes regulating and effecting automobile traffic on the highways is the promotion of the safety of the public. *Barbieri v. Morris*, Mo. Supp., 315 S.W. 2d 711; *Dinger v. Burnham*, Mo. Supp., 228 S.W. 2d 696. The reason for requiring chauffeurs and operators to be licensed is to insure the competency of the operators of motor vehicles in the interest of public safety. 60 C.J.S., Motor Vehicles, Section 148, p. 472.

The qualifications necessary to obtain a chauffeurs license in Missouri are higher than for an ordinary drivers license. Applicants for a chauffeurs license are given a more stringent examination. Also, a chauffeurs license remains in effect for only one year, as opposed to three years for regular operator's licenses. Section 302.177, RSMo Supp., 1965. This requires persons holding a chauffeurs license to renew it every year and submit to the vision examination required by Section 302.175, RSMo Supp., 1965. It also enables the director of revenue, when good cause is shown, to require an applicant to submit to a complete examination as provided by Section 302.173, RSMo Supp., 1965. It is clear that for reasons of highway safety, the legislature has strengthened the licensure requirements of those persons who operate a motor vehicle which transports passengers or merchandise for hire, within the definition provided by Section 302.010. In determining whether the vehicles, operating under the circumstances you describe are for hire, and thus whether the operator is operating as a chauffeur, we must be mindful of the purpose of the legislature in requiring a special license for a chauffeur.

The passengers being carried are guests of the respective motels and these guests pay not only for the room accommodations but for all of the services provided by the motel. Transportation to and from the airport constitutes such a service. It is a convenience to the guests for which they would otherwise have to pay in the form of taxi and limousine fares. It also

may save a substantial amount of time and trouble which might be necessary in calling and arranging for taxi or limousine service. In many places this courtesy car transportation service is advertised at the airport and often is mentioned in the advertising literature to induce persons to patronize the respective motels.

Under the facts you have stated, this is not a situation where a motel will, on a rare occasion or an emergency, provide transportation to one of its guests to or from an airport. It apparently is a regular service available to any one staying or planning to stay at the motel, provided by vehicles designed for the transportation of passengers and operated by the employees of the motel.

It is true that these vehicles are not "for hire" in the sense that they are available to the general public for a fixed price on a specific service. Nevertheless, the use of these vehicles is provided for paying guests of the hotel and payment for such use must be said to be included in the price charged for their accommodations.

It is also true that the operators may be employed and compensated primarily for other duties, and one operator might not "regularly" operate the vehicle in the course of or as an incident to his employment, but neither requirement is made in the second definition of the statute.

Inasmuch as we believe that the persons you describe are chauffeurs under the second definition of Section 302.010 (1), it is not necessary to discuss whether they also may be so classified under either the first or third definition in the statute.

Your next question is whether these van-type vehicles are required to be registered as commercial motor vehicles. This term is defined in Section 301.010 (1), RSMo 1959, as follows:

"(1) 'Commercial motor vehicles', a motor vehicle designed or regularly used for carrying freight and merchandise, or more than eight passengers;"

These requirements are in the disjunctive and a motor vehicle may be classed as a commercial motor vehicle if it falls within one of four categories, i.e.; (1) (2) if it is designed for carrying either freight and merchandise or more than eight passengers; or, (3) (4) it is regularly used for carrying freight and merchandise, or more than eight passengers.

Honorable Thomas A. David

From the facts you have given us it is clear that the van-type vehicles are neither designed nor regularly used for carrying more than eight passengers. You state that the vehicles are designed to accommodate eight persons, and nothing in your letter indicates that more than eight persons are regularly being carried in these vehicles.

Nor do we believe that such vehicles are designed or regularly used for carrying freight or merchandise. The meaning of the word design was discussed in *State v. Lasswell*, Mo.App., 311 S.W.2d 356, wherein the Court said, 1.c. 358:

"[6] 'Designed' has been defined as 'appropriate, fit, prepared, or suitable' and also as 'adapted, designated, or intended.' \* \* \* When applied to property 'designed' ordinarily refers to the purpose for which it has been constructed \* \* \*, and the purpose contemplated and intended by the manufacturer, not the purchaser, usually becomes the controlling factor. \* \* \*"

The Court goes on to say, 1.c. 359:

" \* \* \* the determinative issue was \* \* \* whether his pickup was 'a motor vehicle designed \* \* \* for carrying freight and merchandise' \* \* \*, i.e., whether it was suitable and adapted for the purpose, intended by the manufacturer, of the transportation of goods and tangible articles of commerce, whatever they might have been. Of course, the purpose to which we refer is the primary or dominant purpose, as distinguished from a secondary or incidental one. \* \* \*"

We must assume that in addition to passengers, the vehicles also regularly carry a substantial amount of their baggage. However, the primary or dominant purpose of both the design of these vehicles and their regular use is the transportation of passengers. The carrying of baggage is secondary or incidental to this purpose. The fact that the transportation of passengers to and from an airport incidentally requires the carrying of their baggage does not in itself change the primary purpose or use of the vehicle from a passenger carrier to a carrier of freight or merchandise.

Honorable Thomas A. David

For the foregoing reasons it is our opinion that unless evidence is obtained that the vehicles in question are being regularly used to carry more than eight passengers or freight other than the baggage of passengers, it is not a commercial vehicle and is not required to be licensed as such.

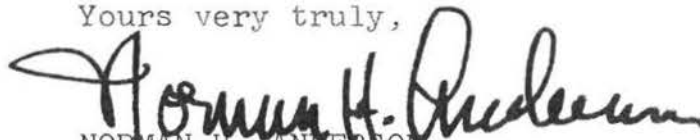
CONCLUSION

A van-type vehicle designed to accommodate eight people and regularly used as a courtesy car by motels to transport not more than eight guests to and from the airport is not a "commercial vehicle" as defined in Section 301.010 (1), RSMo 1959, and is not required to be licensed as such.

An employee of a motel which regularly uses these vehicles for such purpose is acting as a chauffeur as defined in the second classification of Section 302.010 (3), RSMo Supp., 1965, and may be prosecuted for a misdemeanor if he so operates such a vehicle without possessing a valid chauffeur's license.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

JUNIOR COLLEGE DISTRICTS:  
ANNEXATIONS:  
SCHOOL DISTRICTS:

When the boundaries of a public school district which is a component of a junior college district are changed then the boundaries of the junior college district are also changed automatically to coincide with the new boundaries of the component school districts.

OPINION NO. 97 - 1967

November 24, 1967



Honorable Alden S. Lance  
Prosecuting Attorney  
Andrew County  
415 West Main Street  
Savannah, Missouri 64485

Dear Mr. Lance:

This official opinion is rendered in response to your request.

Your question is based upon the following facts: a junior college district has been formed. A public school district known as R-III is one of the component districts making up the junior college district. A six-director public school district adjoining R-III is considering annexation to the R-III school district. You ask, "If this annexation were to be accomplished, would the annexing district automatically become part of Missouri Western Junior College District?"

We find no provision in either the laws governing school districts or those governing junior college districts which expressly provides for the situation that you have presented. Indeed one might doubt, after reading the Junior College District Laws, that the General Assembly took cognizance of the effects of changes in school districts upon the boundaries of the junior college district. However, a reading of the Junior College District Laws as a whole manifests a legislative design that junior college districts be composed only of whole school districts and not parts of school districts.

The opening provision of the law regarding organization of the districts, Section 178.770, RSMo Supp., 1965 states, "In any public school district, or in any two or more contiguous public school districts in this state, whether in the same county or not, the voters resident therein may organize a junior college district in the manner hereinafter provided." From this it is clear that a junior college district can be organized only from whole public school districts.

Sections 178.800, 178.810 and 178.840 speak repeatedly of "component school districts."



Section 178.820 in providing for the election of trustees of the district provides for both at-large trustees and trustees elected from certain component school districts.

Section 178.790, provides:

"The boundaries of any junior college district organized under sections 178.770 to 178.890 shall coincide with the boundaries of the school district or of the contiguous school districts proposed to be included, and the junior college district shall be in addition to any other school districts existing in any portion of the area."

Although there may be some doubt as to whether or not this statute is intended to refer to the boundaries only at the time of organization nevertheless we believe that it strongly indicates that the legislature intended the boundaries of a junior college district to coincide with the boundaries of the component school districts at all times.

We are of the opinion that when the boundaries of a public school district, which is a component of a junior college district, are changed by annexation or other procedures, that change automatically changes the boundaries of the junior college district to coincide with the new boundaries of the component district.

We note that Section 178.890 provides for the annexation of entire school districts to an adjoining junior college district. This statute is not inconsistent with the interpretation we have here adopted. Under our interpretation a school district annexing to another school district would automatically become part of a junior college district. Under Section 178.890, the school district could annex to the junior college district for junior college purposes only and not annex to any of the component school districts.

A proposal to amend the Junior College District Laws regarding boundaries was submitted to the Seventy-fourth General Assembly. Senate Bill No. 273 proposed to amend Section 178.790 by adding the following sentence, "In the event that there shall be any change in the boundaries of any component school district by any method provided by law, the originally established boundaries shall not be affected by any changes in the boundaries of the component school district after the organization of such junior college district." The legislature failed to enact this amendment. The fact that such an amendment was proposed but not approved by the legislature would further indicate that the legislature intended junior college districts to be composed only of entire school districts.

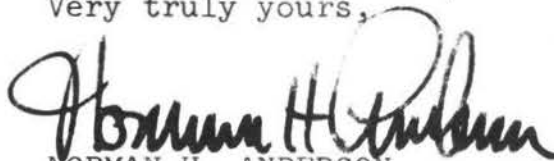


CONCLUSION

Therefore, it is the opinion of this office that when the boundaries of a public school district which is a component of a junior college district are changed, then the boundaries of the junior college district are also changed automatically to coincide with the new boundaries of the component school districts.

The foregoing opinion which I hereby approve was prepared by my assistant, Louis C. DeFeo, Jr.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Norman H. Anderson", written in a cursive style.

NORMAN H. ANDERSON  
Attorney General

LIQUOR: Liquor that has been consumed does not come within the meaning of the word "possession" as used in Sections 311.325, RSMo 1959, and 312.407, RSMo Supp. 1965.

OPINION NO. 100  
(541-1966)

February 7, 1967

Honorable Bob F. Griffin  
Prosecuting Attorney  
Clinton County  
223 East Third Street  
Cameron, Missouri



Dear Mr. Griffin:

This is in answer to your request for an opinion concerning the question whether liquor that has been consumed comes within the meaning of the word "possession" as used in Sections 311.325, RSMo 1959, and 312.407, RSMo Supp. 1965.

Section 311.325, supra, reads as follows:

"Any person under the age of twenty-one years, who purchases or attempts to purchase, or has in his possession, any intoxicating liquor as defined in section 311.020 is guilty of a misdemeanor."

Section 312.407, RSMo Supp. 1965, reads as follows:

"Any person under the age of twenty-one years, who purchases or attempts to purchase, or has in his possession, any nonintoxicating beer as defined in section 312.010, is guilty of a misdemeanor."

We have not found any cases interpreting Sections 311.325 and 312.407, supra.

There are, however, cases defining "possession" as used in liquor laws during prohibition. These laws generally made liquor an illegal commodity and made it a crime to be in "possession" of such liquor.

Honorable Bob F. Griffin

In State v. Lane, 221 Mo.App. 148, 297 S.W. 708, the evidence against the defendant was that he had been seen holding a half-pint bottle of moonshine whisky and was drinking from the bottle. The evidence then showed that the defendant handed the bottle back to the owner. The court quoted from State v. Lunfrunk, Mo.App., 279 S.W. 733, 735, the following definition, l.c. S.W. 709:

"To possess" means to have the actual control, care, and management of the liquor, and not a passing control, fleeting and shadowy in its nature. Neither ownership nor actual physical possession is essential. And possession through a co-principal or through an innocent agent would come within the purview of such statutes."

The court also quoted from Skidmore v. Commonwealth, 204 Ky. 451, 264 S.W. 1053, as follows, l.c. S.W. 709, 710:

"The 'manual act of handling a bottle while taking a drink does not of itself constitute an unlawful possession, within the meaning of the statute where the one so handling the bottle does not claim ownership or control.'

\* \* \* \* \*

"Possession" being the "having, holding, or detention of property in one's own power or command; ownership, whether rightful or wrongful; actual seizing or occupancy."

The court then held as follows, l.c. S.W. 710:

"It is quite clear to us from this record that the defendant was not in actual possession or control of the bottle of whisky, but that it belonged to another and that other person had pleaded guilty to the possession thereof.\* \* \*"

In State v. Mackey, Mo.App., 267 S.W. 5, the defendant was convicted of having whisky in his possession. The evidence consisted of the testimony of two witnesses who stated that in their opinion the defendant was intoxicated. The court said, l.c. 5:

"Defendant was charged with having a gallon of whisky in his possession. The evidence wholly fails to establish that he had any whisky in his possession. If it be con-

Honorable Bob F. Griffin

ceded that the evidence tending to show that defendant was intoxicated was competent, still such evidence would not tend to establish the charge of possession of whisky. It has long been ruled in this state that convictions cannot be based upon suspicion. The judgment should be reversed, and defendant discharged; and it is so ordered."

In State v. Gordineer, Ore., 366 P.2d 161, the Supreme Court of Oregon, en banc, had occasion to interpret ORS 471.430 which provides:

"\* \* \* No person under the age of 21 years shall purchase, acquire or have in his or her possession alcoholic liquor in a manner other than provided for in the Liquor Control Act."

The court said, l.c. 164:

"In our opinion 'possession', as used in this statute, includes in addition to guilty knowledge the intent of the minor to possess full control over the liquor with the right to enjoy its consumption to the exclusion of others."

Finally, in Nethercutt v. Commonwealth, 241 Ky. 47, 43 S. W.2d 330, the court said this, l.c. S.W.2d 330:

"The Attorney General very frankly admits that liquor in one's stomach does not constitute possession within the meaning of the law, and the court erred in overruling the motion for a directed verdict for defendant. In the light of the following cases, we agree with his conclusions: Brooks & Minton v. Commonwealth, 206 Ky. 720, 268 S.W. 339; Skidmore v. Commonwealth, 204 Ky. 451, 264 S.W. 1053; Sizemore v. Commonwealth, 202 Ky. 273, 259 S.W. 337."

In view of the foregoing, it is the opinion of this office that liquor that has been consumed does not come within the meaning of the word "possession" as used in Sections 311.325, RSMo 1959, and 312.407, RSMo Supp. 1965.

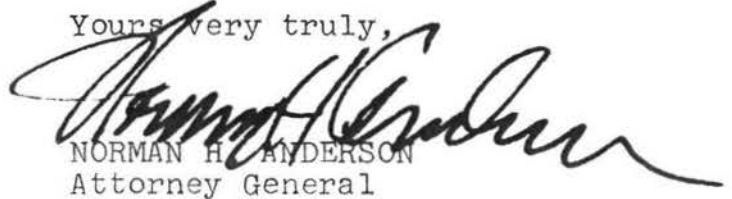
Honorable Bob F. Griffin

CONCLUSION

It is the opinion of this office that liquor that has been consumed does not come within the meaning of the word "possession" as used in Sections 311.325, RSMo 1959, and 312.407, RSMo Supp. 1965.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in dark ink, appearing to read 'Norman H. Anderson', written in a cursive style.

NORMAN H. ANDERSON  
Attorney General

CORONER'S FEES: A coroner of a fourth class county, being himself, a physician or surgeon, is not entitled to a twenty-five dollar fee (\$25) in conducting a post-mortem examination in addition to compensation in the form of salary as provided by law.

OPINION NO. 101  
(542-1966)

July 11, 1967

Honorable William H. Bruce  
Prosecuting Attorney  
Reynolds County  
Centerville, Missouri 63633



Dear Mr. Bruce:

This is to acknowledge receipt of your request for an official opinion from this office in regard to the following question:

"Will you please let us know, under Section 58.530 when the court allows twenty five dollars (\$25) for a post-mortem, being a physician, is the coroner allowed to retain the twenty five dollars (\$25) in addition to his salary?"

Section 58.530, RSMo 1959, reads as follows:

"Whenever the coroner, being himself a physician or surgeon, shall conduct a post-mortem examination of the dead body of a person who came to his death by violence or casualty, and it shall appear to the county court that such examination was necessary to ascertain the cause of such person's death, the county court may allow the coroner therefor an additional fee, not exceeding twenty-five dollars, to be paid as his other fees in views and inquests; but section 58.560 shall not be construed to apply to any such examination when made by the coroner himself."



In an opinion rendered by this office relating to the question of coroner's fees in "views and inquests" under Section 58.520, RSMo 1959, it was held that a coroner of a county of the third class was not entitled to fees for performing his services in addition to compensation in the form of salary as provided by law. Op. Atty. General No. 89, Thurman, 1-22-53. It is submitted that the immediate issue for our determination is whether or not the "physician fee" as referred to in Section 58.530, supra, is to be given the same consideration as a coroner's fees in "views and inquests" as ruled upon in the above opinion.

In the construction of statutes, courts must, if possible, give effect to every word, phrase, clause and sentence of the statute. In re Dugan's Estate, 309 S.W.2d 137. Thus, we are provided with a clue to our question when reference is made to the statute itself. Here, it is clearly stated that a coroner, being himself a surgeon or physician is entitled to a fee of twenty-five dollars which is to be paid as his other fees in "views and inquests." (emphasis ours).

In order to ascertain legislative intent, a court should trace the historical development of the legislation, considering all changes and modifications of legislative policy from time to time, and related statutes. State v. Chadeayne, 323 S.W.2d 680. When reference is made to the Missouri statutes, it is immediately noted that Sections 58.530 and 58.520, supra, providing for payment of fees to coroners, were both enacted in 1939. The Attorney General's opinion, supra, also commented on the fact that prior to 1945, coroners received compensation for their services by payment of "fees". However, the reasoning of the opinion was that with the enactment of legislation in 1945 providing for the salary of a county coroner, and by requiring a coroner to pay to the county treasurer all fees accruing to his office, the legislature intended that a coroner's salary was to be full compensation for his services and that he would not be entitled to the fees provided in Section 58.520. Thus, by the authority of this opinion, one could logically conclude that the same reasoning is applicable to Section 58.530, and that the legislature intended the denial of a fee formally payable to a coroner acting as a physician. It is presumed that the legislature is aware of an interpretation placed upon existing statutes and by amending a statute or enacting a new statute on the same subject, the legislature intended to effect some change in the existing law. Wright v. J. A. Tobin Const. Co., 365 S.W.2d 742.

Honorable William H. Bruce

Finally, we turn to consider the relationship between a post-mortem examination and a coroner's duties in views and inquests. In the case of *Patrick v. Employees Mut. Liability Ins. Co.*, 118 S.W.2d 116, 233 Mo.App. 251, the court held that coroners are not authorized to perform an autopsy in their discretion except in connection with an inquest to be held before a jury of persons supposed to have died by casualty. This theory was also followed in the case of *Crenshaw v. O'Connell*, 150 S.W.2d 489, 235 Mo.App. 1085, where the court stated as follows:

"The law invests the coroner with no authority to have an autopsy performed except in connection with, and as an incident to, an inquest to be held before a jury upon the body of a person supposed to have come to his death by violence or casualty, \* \* \*" (emphasis ours)


We are therefore persuaded that an autopsy or post-mortem examination is a proceeding which is in connection with and necessarily incident to the inquest procedure. See *Coty v. Baughman*, 50 S.D. 372, 210 N.W. 348. Consequently, when a coroner acts as a physician in conducting a post-mortem examination, he is charged with the responsibility and proper conduct of both activities. This being true, we believe that the twenty-five (\$25) fee payable to a coroner acting as a physician is in the nature of and in the same category as the coroner's fees in views and inquests ruled upon in Op. Atty. General No. 89, Thurman, 1-22-53, and should be denied to him as extra compensation.

#### CONCLUSION

A coroner of a fourth class county, being himself, a physician or surgeon, is not entitled to a twenty-five dollar fee (\$25) in conducting a post-mortem examination in addition to compensation in the form of salary as provided by law.

The foregoing opinion, which I hereby approve, was prepared by my assistant, B. J. Jones.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

March 20, 1967

FILED

102

OPINION NO. 102

543 (1966)

Answered by Letter, Chitwood

Honorable C. M. Bassman  
State Representative  
Gasconade County  
9th and Gutenberg  
Hermann, Missouri

Dear Representative Bassman:

This office is in receipt of your request for a legal opinion on two questions raised in connection with a proposed legislative change of Section 52.280 RSMo., 1959. Said section authorizes a collector of a third or fourth class county to retain a sum not to exceed twenty-five per cent of the maximum amount of fees and commissions he may retain under the statutes as compensation, for deputy or clerical hire. Said section reads as follows:

"In addition to the maximum amount of fees and commissions permitted to be retained by county collectors in sections 52.260 and 52.270, each collector in counties of the third and fourth classes may retain for the payment of deputy and clerical hire a sum not to exceed twenty-five per cent of the maximum amount of fees and commissions which the officer is permitted to retain by the sections, but the deputy and clerical hire is payable out of fees and commissions earned and collected by the officer only, and not from general revenue." (underscoring ours)

As we understand it the proposed legislative change in law, is to repeal Section 52.280 supra and to enact a new section with the same wording as said Section 52.280, except that where the present section reads "twenty-five per cent of the maximum amount of fees and commissions which the officer is permitted to retain by these sections" the new

Honorable C. M. Bassman

section would read "fifty-per cent."

The specific inquiries you have made regarding the proposed change in Section 52.280, are:

"Would this be construed to mean that this would constitute a raise in the county collector's salary?"

"Under the state constitution state or county officer's salary may not be raised during their term of office unless an additional duty is imposed.

"In your opinion would the change from twenty-five per cent to fifty per cent that could be retained for deputy or clerical hire be retainable by the county collector if the change would be enacted during his term of office?"

In an opinion of this office issued to Haskell Holman, State Auditor, on October 22, 1953, it was held that an increase in the amount available to the county clerk for deputy or clerical hire or additional compensation for regular deputies or assistants is not in violation of Article VII, Section 13 of the Constitution of Missouri, prohibiting an increase of compensation of a county officer during his term of office because such deputies or assistants have no definite term of office and an increase allowed to an office in the amount to be expended for clerical help is not an increase in the compensation of such officer. The same legal principle involved in said opinion is also involved in the present inquiries, and a copy of such opinion is enclosed.

In this connection, we wish to point out that if the proposed change in Section 52.280, supra, were made during the collector's term of office, funds collected under authority of the section and retained by him could be used solely for deputy and clerical hire. If he spent only a portion of said funds for deputy or clerical hire, he could not retain the unused portion for himself, as he is legally accountable for such used portion of said funds. This was held to be the law in an opinion of this office, issued to Norman S. Newkirk, Collector of Revenue, Warsaw, Missouri, on August 27, 1936, a copy of which is enclosed.

Honorable C. M. Bassman

For reasons given in the enclosed opinion, our answer to the first inquiry is that any additional funds collected for deputy or clerical hire by the collector, if the proposed change in Section 52.280, supra, mentioned above were enacted, would not be an increase in compensation of the collector.

Our answer to the second inquiry is that if the proposed change of Section 52.280, supra, from twenty-five per cent of collections to be retained by the collector for deputy or clerical hire, to fifty per cent were made, and if such legislative change were made during the collector's term of office, he could legally use the additional amount collected for deputy or clerical hire.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

Encl: Opinion No. 41, Haskell Holman, 10/22/1953

COUNTY BOARDS OF EDUCATION: Where only one school district  
SCHOOLS: would be under the jurisdiction  
SCHOOL DISTRICTS: of a county board of education,  
the board of education of that  
school district should serve as  
the county board of education as  
provided by Section 162.113, RSMo  
Supp. 1965.

OPINION NO. 103

February 14, 1967

Honorable James L. Paul  
Prosecuting Attorney  
McDonald County  
Pineville, Missouri 64856



Dear Mr. Paul:

This opinion is issued in response to your request for a ruling.

You advise us of the following facts:

"With the exception of the former Goodman Consolidated area, which is now a part of Neosho Reorganized District, and small segments in the Northwest part of the county which have reorganized with Seneca, and in the Southeast part of the county which has reorganized with Southwest High at Washburn, the remaining part of McDonald County is now reorganized as McDonald County R-1 which comprises the former consolidated areas of Rocky Comfort, Pineville, Anderson, Noel and Southwest City."

In your letter you ask the following question:

"Since McDonald County R-1 comprises all of McDonald County with the exception of certain areas who have annexed to other schools outside McDonald County, does the rule apply that one-half of the Directors shall be elected from the Eastern District and one-half from the Western District as under the old County School Board, or



Honorable James L. Paul

"May the Directors be elected at large from the entire county which comprises McDonald County R-1 School District?"

The facts set forth in your letter require an answer different from that sought by question. As hereinafter explained, there being only one school district in McDonald County, no county board of education is to be elected in McDonald County, but the board of education of the sole school district in McDonald County shall also serve as the County Board of Education in McDonald County.

This office has previously ruled that the jurisdiction of a county board of education created under Sections 162.101 or 162.111 RSMo Supp. 1965, is not coterminous with the boundaries of county, but that the territorial jurisdiction of a county board of education is coterminous with the territorial boundaries of the school districts within the county board's authority. Opinion No. 133, Boulware, March 18, 1964 (copy enclosed).

Your letter states that parts of McDonald County lie in school districts which would be under the jurisdiction of the county boards of education of Newton and Barry counties. The remainder of McDonald County is contained in one school district, namely, McDonald County R-1. Thus, there is only one school district in McDonald County under the jurisdiction of the county board of education.

Section 162.113, RSMo Supp. 1965, provides:

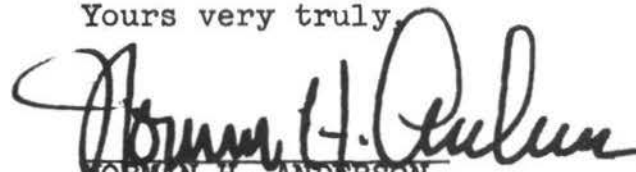
"In the event there is only one school district in any county, the board of education for that district shall serve as the county board of education."

#### CONCLUSION

Therefore it is the opinion of this office that, there being only one school district under the jurisdiction of the county board of education of McDonald County, the board of education of that school district shall serve as the county board of education as provided by Section 162.113, RSMo Supp. 1965.

The foregoing opinion which I hereby approve was prepared by my assistant Louis C. DeFeo, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

Enclosure: Opinion No. 133,  
Boulware, 3/18/64.

HOUSE OF REPRESENTATIVES:  
REPRESENTATIVE DISTRICTS:  
REAPPORTIONMENT:  
RESIDENCE:

A representative in the 1967 Legislature (74th General Assembly) is qualified under Article III, Section 4 of the Constitution to represent a district any part of which is within the county in which the representative resides.

February 7, 1967

OPINION No. 104 (1967)  
545 (1966)

Honorable Richard J. Rabbitt  
State Representative - 8th District  
Missouri House of Representatives  
4340 Forest Park  
St. Louis, Missouri 63108



Dear Representative Rabbitt:

This opinion responds to your request which reads as follows:

"My question is whether it is necessary for a state representative to live in the legislative district from which he has been elected for at least one year, since the new reapportioned districts will be less than one year old when the 74th General Assembly convenes."

This problem involves the interpretation of Article III, Section 4, of the Constitution which provides:

"Each representative shall be twenty-four years of age, and next before the day of his election shall have been a qualified voter for two years and a resident of the county or district which he is chosen to represent for one year, if such county or district shall have been so long established, and if not, then of the county or district from which the same shall have been taken."  
(Emphasis added.)

Honorable Richard J. Rabbitt

Section 21.080, RSMo 1959, is identical to the language in Article III, Section 4, of the Constitution.

In construing the intent and meaning of the Constitution, our Missouri Supreme Court, en banc, has stated in *State vs. Neill*, (1966) 397 S.W. 2d 666 (l.c. 669):

"The Constitution in general is subject to the same rules of construction as other laws with due regard being given to the broader scope and objects of the Constitution as a charter of popular government, and intent of the organic law is the primary object to be attained in construing it."

The Court, in the *Neill* case, supra, reiterated the rule for statutory construction, (l.c. 669):

"In determining the meaning and application of statutory provisions, this court must ascertain the legislative intent from the words used, if that is possible, and in doing so give to such words their plain and ordinary meaning so as to promote the object and manifest purpose of the statutes."

Keeping in mind the rules of statutory construction enumerated in the *Neill* case, supra, especially that the language used is to be given its plain and ordinary meaning, let us examine these pertinent sections. Broken down into their component clauses, the qualifications in Article III, Section 4, are:

1. Be at least 24 years of age;
2. Be a qualified voter for two years;
3. Be a resident of the County or District which he is chosen to represent for one year;
4. If the County or District has not been established for one year then be a resident of the county or district from which the same shall have been taken.

Since representative districts were reapportioned in 1966 manifestly the primary problem is the construction of the last clause of this section.

Honorable Richard J. Rabbitt

The resolution of this problem appears to turn upon the construction of the language "county or district". It should be remembered that this section was written in the Constitutional Convention in the light of the philosophy that each county had at least one representative and some counties had more than one. Our problem here involves a situation where a county has multiple representative districts within the county and this language of the Constitution must be interpreted in the light of the entirely changed philosophy of apportionment of representative districts brought about by the required reapportionment of the state with respect to representative districts to conform to the one man - one vote doctrine. Our investigation of the Constitutional Convention debates offers no aid in the solution of this problem.

Examination of this section of the Constitution shows that the language "county or district" is used three times in the section. The first two times it seems clear that where representative districts have been established for more than one year the representative to be qualified must be a voter for two years and a resident of his district for one year. The last clause, however, is clearly intended to be an exception, and to apply only in the situation where the representative districts have not been established for one year, which of course is the situation which we have here.

There are three possible constructions. First, if we give the last clause the narrow construction that a person must be a resident of the new reapportioned district at the time he takes the office of representative, this would tend to ignore the clearly much broader language of the exception clause which uses the words "county or district". A second possible construction is that if the new reapportioned district includes portions of more than one former existing representative district then a representative would be qualified if he was a resident of any district from which the new reapportioned district was formed. This certainly is a logical construction of the language but here again it does ignore the broader language in the exception clause of "county or district". The third construction would be that a representative is qualified if he is a resident of the county in which all or any portion of a district is located. This construction gives full meaning to the disjunctive language "county or district".

To better illustrate our meaning and construction of this statute we attach hereto an Exhibit. This exhibit shows in the area marked "X" an entire county. In the Areas marked 1, 2, 3 and 4 are indicated representative districts before the reapportionment.

Honorable Richard J. Rabbitt

In the area marked "A" is indicated a new reapportioned district which includes parts of former existing districts 1, 2, 3 and 4. Thus the first construction of Section 4 of the Constitution discussed above would require a representative to reside within the boundary of the district designated "A". The second construction discussed above would permit the representative from new district "A" to reside anywhere within former districts 1, 2, 3 and 4. The third construction would permit a representative to reside anywhere within county "X". The use of the word "or" between the words "county" and "district" makes these two descriptions of areas in the disjunctive.

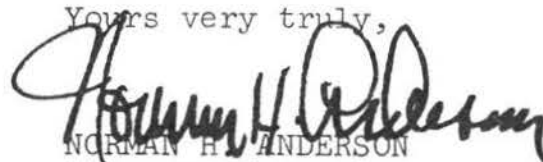
We think we should give the language "county or district" in the last clause of Section 4, its full breadth of meaning and not a restricted or narrow interpretation. This interpretation allows the electorate to choose any representative they wish who lives in the county. We perceive no reason from the language used in this clause why the electorate should be limited or was intended to be limited in their choice in the absence of language clearly limiting their choice. Manifestly after reapportionment, representatives so chosen who do not live within their district would be required to establish residence within their district before they would be qualified at a subsequent term.

#### CONCLUSION

A representative in the 1967 Legislature (Seventy-Fourth General Assembly) is qualified under Article III, Section 4 of the Constitution to represent a district any part of which is within the county in which the representative resides.

The foregoing opinion, which I hereby approve, was prepared by my Assistant J. Gordon Siddens.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

EXHIBIT

<i>X</i>	2		1
		A	
	4		3
County			



TAXATION:  
INTANGIBLE TAX:  
SAVINGS AND LOAN ASSOCIATIONS:

Dividends received from both in-state and out-of-state savings and loan associations are not subject to Chapter 146, RSMo, the Missouri Intangible Tax Law.

OPINION NO. 105  
(546, 1966)

March 16, 1967

Honorable Thomas A. David  
Director of Revenue  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. David:

This is in answer to your request for an opinion concerning the question whether dividends from out-of-state savings and loan associations come within the purview of the Missouri Intangible Tax Law. If such dividends are subject to the Missouri Intangible Tax Law, you then ask whether out-of-state savings and loan associations are nevertheless exempt because of Section 148.520, RSMo Supp. 1965.

In order to answer the above questions, it is first necessary to determine whether dividends paid from any savings and loan association are subject to Chapter 146, RSMo, the Missouri Intangible Tax Law.

The Intangible Personal Property Tax is a tax based on the yield from the holding of intangible personal property. Section 146.020, RSMo 1959, which imposes the tax reads in part as follows:

"1. Except as otherwise provided by law, intangible personal property having a taxable situs in the state of Missouri at any time during the calendar year shall be subject to a property tax for the calendar year following the year in which the property had such taxable situs in this state.

"2. The tax on intangible personal property shall be based on the yield of the property during the preceding calendar year, and the rate of tax shall be four per cent of such yield.

\*

\*

\*

\*"

Honorable Thomas A. David

Section 146.030, RSMo 1959, determines who is liable for the tax and reads as follows:

"The tax for the year 1947 and each succeeding year shall be apportioned among those persons who during the preceding calendar year held or acquired the legal title to or equitable title or beneficial interest in intangible personal property subject to the property tax provided by section 146.020, according to the part of the entire yield of such property which they respectively received during the preceding calendar year, and each such person shall be liable for his resultant portion of said tax."

Section 146.010, RSMo Supp. 1965, defines "intangible personal property" and "yield" as follows:

"1. 'Intangible personal property' means moneys on deposit; bonds, except those which under the constitution or laws of the United States may not be made the subject of a property tax by the state of Missouri; certificates of indebtedness, other than capital notes issued by banks or trust companies; notes, debentures; accounts receivable, conditional sales contracts, which have incorporated therein promises to pay; and real estate and chattel mortgages.

"4. The terms 'yield' or 'annual yield' mean the aggregate proceeds received as a result of ownership or beneficial interest in intangible property whether received in money, credits or property, exclusive of any return of capital, and less the amount of interest required to be credited by the owner thereof, during the preceding calendar year, to reserve liabilities of the owner maintained under the statutes of this state, and less proceeds set aside or accumulated by the owner thereof under contracts or agreements for pension or retirement or employee benefits."

Honorable Thomas A. David

Thus, only those intangibles defined by Section 146.010, supra, are taxed as intangibles by Section 146.020, supra. In order to tax dividends received from savings and loan associations there must be a holding of legal or equitable title or a beneficial interest in "intangible personal property", as defined.

A close reading of Section 146.010, supra, shows no specific inclusion of "accounts" in savings and loan associations as "intangible personal property". Specifically included are moneys on deposit, bonds, certificates of indebtedness, notes, debentures, accounts receivable, and mortgages. Therefore, in order for a tax to be due on the receipt of dividends from an "account" in a savings and loan association an "account" must be said to be one of those enumerated "intangibles".

Tax laws, of course, must be strictly construed, and if the right to tax is not plainly conferred by statute, it is not to be extended by implication. In re Gerling's Estate, Mo., 303 S.W.2d 915. Also, where it is doubtful whether property proposed to be taxed falls within the description used by the law, it is proper to resort to other statutes, relating to the subject, to ascertain the intention of the legislature. Hannibal & St. J. R. Co. v. Shacklett, 30 Mo. 550.

Chapter 369, RSMo, the "Savings and Loan Law", provides for the creation, regulation and operation of savings and loan associations.

Enclosed is Attorney General Opinion No. 82, dated March 16, 1959, to the Honorable Paul R. Sims, interpreting certain sections of the Savings and Loan Law and holding that:

" \* \* \* Section 369.325, RSMo Supp. 1957, ostensibly authorizing school districts and other political subdivisions of Missouri to invest their funds in accounts of savings and loan associations subject to Chapter 369, RSMo 1949, as amended, is, to that extent, invalid as contravening Article 6, Section 23, Missouri's Constitution of 1945."

In reaching that holding Opinion No. 82 on pages 4 and 5 discusses the nature of an "account" in a savings and loan association. The opinion quotes Section 369.310, 369.140 and 369.250, RSMo, for the proposition that, page 5:

Honorable Thomas A. David

" \* \* \* investing in 'accounts' of a savings and loan association is tantamount to investing in the stock of a corporation, \* \* \*."

Section 369.310, supra, quoted in the opinion reads as follows:

"No association shall accept deposits of money, nor shall any association agree to pay either interest, or a guaranteed rate or amount of dividends, upon any accounts issued by it; provided, however, that this prohibition shall not be applicable to the payment of interest upon money borrowed under the power to borrow provided elsewhere in this chapter."

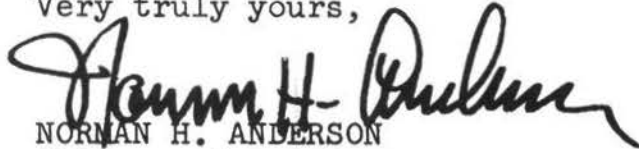
It is the opinion of this office that an "account" in a savings and loan association is not "intangible personal property" as defined by Section 146.010, supra, and therefore, dividends received from the holding of an "account" in both in-state and out-of-state savings and loan associations are not subject to the Missouri Intangible Personal Property Tax.

#### CONCLUSION

It is the opinion of this office that dividends received from both in-state and out-of-state savings and loan associations are not subject to Chapter 146, RSMo, the Missouri Intangible Tax Law.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General

Enclosure: Opinion No. 82

MISSOURI RURAL REHABILITATION CORPORATION:  
AGRICULTURE:  
DEPARTMENT OF AGRICULTURE:

March 23, 1967



OPINION NO. 106  
(547, 1966)  
Answered by letter-Downey

Honorable Dexter D. Davis  
Commissioner of Agriculture  
Jefferson Building  
Jefferson City, Missouri

Dear Commissioner Davis:

Reference is made to your request for an official opinion of this office concerning the use of money in the Missouri Rural Rehabilitation Corporation Fund. You are specifically interested in whether or not the Missouri State Fair may borrow money from this fund for the rejuvenation of capital improvements. If the State Fair cannot borrow the funds under existing law, you further inquire whether legislation may be enacted permitting such loans.

A review of the background to the fund is helpful in answering your questions. In 1933 the entire country was suffering a severe economic depression. The Congress of the United States enacted the Federal Emergency Relief Act of 1933 in an effort to alleviate some of the severe personal financial distress and with hopes of commencing the restoration of economic and financial health in the country. Funds were made available under the Act for emergency relief in rural areas to be administered on the state level by corporations established for that purpose. The Missouri Rural Rehabilitation Corporation was incorporated by pro forma decree of the Circuit Court of Cole County, Missouri, on September 5, 1934, as a benevolent and nonprofit corporation under the provisions of Article X, Chapter 32, Revised Statutes, 1929. The powers of the corporation are set forth in separate subparagraphs denominated "A" through "L" inclusive of paragraph "THIRD" of the corporate charter. The objects and purposes of the corporation are declared in subparagraph "A" as follows:



Honorable Dexter D. Davis

"To rehabilitate individuals and families as self-sustaining human beings by enabling them to secure subsistence and gainful employment from the soil, from coordinate and affiliated industries and enterprises and otherwise, in accordance with economic and social standards of good citizenship;"

Paragraphs "B" through "L" enumerate specific powers and appear to be in aid of the general objects and purposes recited in subparagraph "A".

Paragraph "SIXTH" of the Articles of Incorporation provided that upon dissolution of the corporation in accordance with law the balance of funds on hand shall become a part of the general fund of the State of Missouri, subject to appropriation by the State Legislature.

Thus, the Missouri Rural Rehabilitation Corporation was formed for the purpose of administering a rural rehabilitation program in the State of Missouri with grants made by the Federal Government. The President of the United States established the Resettlement Administration as an independent agency and placed rehabilitation programs in that agency which were administered by state corporations including the Missouri Rural Rehabilitation Corporation.

In 1935 the Comptroller General of the United States advised the Resettlement Administration that funds for its programs could be expended only as a direct federal activity and could not be expended through the various rural rehabilitation corporations in the several states. Pursuant to such advice the various state corporations assigned their assets in trust to the United States to be used by the Resettlement Administration for the administration of rural rehabilitation programs in the several states. On October 31, 1936, the Missouri Rural Rehabilitation Corporation transferred its assets to the United States in trust for the purpose of carrying on a rural rehabilitation program in the State of Missouri.

The Farmers Security Administration and later the Farmers Home Administration administered the assets so transferred. Apparently the Missouri corporation was dissolved on March 7, 1940.



Honorable Dexter D. Davis

In 1950 Congress authorized the Federal Government to return to the states the funds of the various rural rehabilitation corporations being held in trust and administered by the Federal Government. This action was authorized by the "Rural Rehabilitation Corporation Trust Liquidation Act" (Public Law 499, 81st Congress) Title 40, Sections 440-444, U.S.C.A. The Act provided that application for a return of the assets held by the Federal Government be made to the Secretary of Agriculture by the state rural rehabilitation corporation, or, if the corporation had been dissolved, application for a return of the assets be made by some other agency or official of the state as designated by the state legislature.

The following provision of the Rural Rehabilitation Corporation Trust Liquidation Act is of particular significance in considering the questions which you raised; Title 40, Section 440 (c):

"\* \* \* The application shall contain a covenant, binding upon the applicant when accepted by the Secretary on behalf of the United States, that the applicant will abide by the determinations and apportionments of the Secretary provided for in sections 440-444 of this title and the payments made by the Secretary pursuant to said sections, that the returned assets and the income therefrom will be used only for such of the rural rehabilitation purposes permissible under the corporation's charter as may from time to time be agreed upon by the applicant and the Secretary; \* \* \*" (emphasis added)

As noted above, the Missouri Rural Rehabilitation Corporation had been dissolved on March 7, 1940. Therefore, the General Assembly enacted legislation in 1951 designating the Commissioner of Agriculture as the state official to make application and receive from the United States the trust assets of the Missouri Rural Rehabilitation Corporation held by the United States; Section 261.025, RSMo 1959. The Act of Congress which provided for the return of the assets to the several states also authorized the Secretary of Agriculture of the United States to enter into agreements with the individual states for the administration of such assets for carrying out the purposes of Title I and II of the Bankhead-Jones Farm Tenant Act (7 U.S.C.A., Sections 1001-1007a). Pursuant to such agreements, the Federal Government would make loans in the state to eligible persons for the purpose of acquiring, repairing

Honorable Dexter D. Davis

or improving family size farms. In accordance with this provision, the General Assembly in 1951 authorized the Commissioner of Agriculture to enter into such agreements with the Secretary of Agriculture of the United States; 261.026, RSMo 1959.

On December 21, 1951, the Commissioner of Agriculture made application to the Secretary of Agriculture of the United States for return of the assets of the Missouri Rural Rehabilitation corporation. By letter dated January 17, 1952, the Administrator of the Farmers Home Administration accepted the application and the actual transfer of the assets from the Federal Government to the Commissioner of Agriculture is evidenced by a transfer document dated January 17, 1952, and accepted by the Commissioner of Agriculture on January 23, 1952. This transfer document specifically provided that the transfer was made for the purpose of enabling the Commissioner of Agriculture to enter into an agreement with the Secretary of Agriculture of the United States under which the assets would be administered in the State of Missouri, pursuant to the provisions of the Bankhead-Jones Farm Tenant Act. On January 23, 1952, an agreement for administration of the assets by the Secretary of Agriculture was executed by the Commissioner of Agriculture acting for the State of Missouri and the Administrator of the Farmers Home Administration acting for the United States.

In 1957, the General Assembly enacted legislation providing for the termination of the agreement by the Commissioner of Agriculture and the Secretary of Agriculture of the United States under which the assets of the Missouri Rural Rehabilitation Corporation were administered by the United States. The Act provided for the return of the assets to the State Treasury into a special fund known as the Agriculture Emergency Fund; Section 261.027, RSMo 1959. The following provision of the Act is of particular relevance to the questions which you have raised; 261.027 (3):

" \* \* \* The agriculture emergency fund shall be under the control of the governor of the state of Missouri, who shall provide for the investment and reinvestment of the fund in secured or insured agricultural loans, government bonds, or other convertible securities. The fund and any income or interest received from the investment thereof may be released by and at the discretion of the governor to the commissioner of agriculture upon the request of the commissioner for emergency agricultural relief and rehabilitation purposes." (emphasis added)

Honorable Dexter D. Davis

The file which you have furnished to this office includes a carbon copy of a purported contract between the United States and the Commissioner of Agriculture which was signed by the Commissioner of Agriculture and which apparently was executed by the Administrator of the Farmers Home Administration on or about April 30, 1957. The agreement provides for the continued administration of some assets by the United States and for the return of other assets to the Commissioner of Agriculture. Article II of the agreement includes the following provisions:

"Section 2. The assets hereby returned to the Commissioner and the proceeds thereof and any other assets hereafter returned to the Commissioner and the proceeds thereof, shall be used only:

"(a) for making agricultural loans, including such loans to be insured under Title I of the Bankhead-Jones Farm Tenant Act, as amended, and the Act of August 28, 1937, as amended;

"(b) for such other rural rehabilitation purposes permissible under the dissolved Corporation's charter as may from time to time be agreed upon between the parties hereto; and

"(c) for the expenses of administering such returned assets, provided that during any year such expenses, without the approval of the Government, shall not exceed 3 percent of the then book value of such assets.

"Section 3. The Commissioner agrees to furnish to the Government such statements and other information as may be required by the Government to enable it to determine, as required by Sections 2(c) and 4(a) of said Act of May 3, 1950, that the returned assets and the proceeds thereof are being used for the purposes mutually agreed upon between the parties hereto."

This agreement apparently terminated on August 31, 1962.

A new agreement for administration of the assets was executed by the United States and the State of Missouri by signature of the Commissioner of Agriculture on July 30, 1962, and by signature of the Administrator of the Farmers Home Administration of August 3,

Honorable Dexter D. Davis

1962. This agreement is in force at the present time and terminates on August 31, 1967. Article IV of the agreement provides in part as follows:

"Section 6. Any trust assets heretofore, hereby or hereafter returned by the Government to the Trustor (Commissioner of Agriculture of Missouri) may be used by the Trustor only:

"(a) for such rural rehabilitation purposes permissible under the subject Corporation's charter as may hereafter from time to time be agreed upon between the parties hereto, and as are within the Trustor's authority under State Law.

"(b) for specific rural rehabilitation purposes hereby agreed upon, as follows:

For making agricultural loans, including farm ownership loans, to be insured by the Government, and soil and water conservation loans, to be insured by the Government, provided that such loans will be made only to individuals who are or will become owner-operators of not larger than family farms and will not be made to partnerships, corporations or associations."

Pursuant to the statutes referred to herein, both federal and state, and pursuant to the agreements referred to herein between the State of Missouri and the United States, approximately \$2,250,000 in funds or assets has accumulated in the Agriculture Emergency Fund. As noted above, the purposes for which the State of Missouri can use this fund are restricted by the Act of Congress which provided for the liquidation of the rural rehabilitation corporation trusts and the return of the assets to the several states. 40 U.S.C.A., Section 440 (c), requires the returned assets to be used only for the rural rehabilitation purposes permissible under the corporation's charter as may be agreed upon by the Secretary of Agriculture and the state applicant. Although the Missouri Rural Rehabilitation Corporation has been dissolved, reference to the



Honorable Dexter D. Davis

provisions of its charter may be of some assistance in determining the purposes for which the funds may be used. An examination of the charter does not disclose that a loan of the monies for the purpose of rejuvenating capital improvements at the State Fair is among the rural rehabilitation purposes as contemplated by the charter. Although paragraph "SIXTH" of the charter provides that upon dissolution, the balance of the funds shall become a part of the general fund of the State of Missouri subject to appropriation by the state legislature, 40 U.S.C.A., Section 440 (c), provides that the returned assets will be used only for the rural rehabilitation purposes permissible under the charter. Inasmuch as the funds have been returned to the State of Missouri pursuant to the federal statute, the purposes for which such funds may be used by the State of Missouri are limited by such statute.

As noted above, grants by the Federal Government to the Missouri Rural Rehabilitation Corporation were made for the purpose of alleviating economic and financial distress in the rural areas in Missouri and for the purpose of restoring economic health in rural Missouri by rehabilitating individuals participating in the rural economy of the state. Although the Great Depression came to an end long ago, some depressed areas in the rural economy of Missouri, as well as other states, continue to appear at the present time. It appears to be the intention of 40 U.S.C.A., Section 440, that these assets continue to be used for the rehabilitation of persons in the rural economy of the state.

Section 261.027 (3), RSMo 1959, in recognition of the provision of 40 U.S.C.A., Section 440 (c), provides that the Governor may release the funds at the request of the Commissioner of Agriculture for emergency agricultural relief and rehabilitation purposes. The agreements referred to above between the Secretary of Agriculture of the United States and the Commissioner of Agriculture incorporate provisions for the use of the funds consistent with these federal and state statutes. All of the statutory and contractual provisions applicable to these assets and funds restrict the use of the funds to rural rehabilitation purposes.

It would be presumptuous of this office to express definitive conclusions as to the type of agreement that can be entered into by the federal authorities under 40 U.S.C.A., Section 440 (c). It is suggested that the proposed plan for the use of the funds

Honorable Dexter D. Davis

be submitted for the consideration and approval of the appropriate federal authorities. If the federal authorities conclude that an agreement can be entered into authorizing the fund to be loaned to the Missouri State Fair for the rejuvenation of capital improvements, a definitive opinion from this office in regard to the authority of the Commissioner of Agriculture to enter into such an agreement pursuant to Section 261.027 (3), can be rendered.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

TJD:db



POLITICAL SUBDIVISIONS:  
PUBLIC WATER SUPPLY DISTRICTS:  
TAXATION:  
EXEMPTIONS  
SALES TAX

A public water supply district organized under the provisions of Chapter 247, RSMo 1959, is a "political subdivision" within the meaning of that term as used in Section 39 (10), Article III,

Constitution of Missouri 1945, and such districts are not subject to sales or use tax for the purchase of materials or equipment made directly by the district out of its funds to be owned exclusively by and for the exclusive use of the district.

109 (1967)  
OPINION NO. 550

April 25, 1967

Honorable Don R. Ferry  
Prosecuting Attorney of Vernon County  
Reed Building  
Nevada, Missouri



Dear Mr. Ferry:

This is in answer to the request of your predecessor for an opinion of this office as to whether sales or use taxes may be imposed upon the sale of personal property to a public water supply district.

The request states that:

"Public Water Supply District No. 1 of Barton County, Missouri, is a public water supply district formed in Barton County, Missouri, under the provisions of Sections 247.010 through 247.220, Revised Statutes of Missouri, 1959, by decree of the Circuit Court of Barton County, Missouri, entered in case 11828 on 17 October 1966.

\* \* \* \* \*

"The United States of America acting through the Farmers Home Administration, U.S. Department of Agriculture, has approved an insured loan on revenue bonds to be issued by the district in the amount of \$800,000.00 and a grant of \$350,000.00 for the construction of the rural waterworks system.

Honorable Don R. Ferry

"Contracts for construction (not including the purchase of pipe and material such as meter pits) will be awarded private contractors on a competitive bid basis and will be conditioned upon use by the contractor of plastic pipe and material purchased by, owned exclusively by, and for the exclusive use of the district."

The question is whether the district is exempt from the payment of sales or use taxes upon the purchase of the pipe and other materials for use by the district.

Article III, Section 39, of the Missouri Constitution 1945 provides:

"The general assembly shall not have power:

"10. To impose a use or sales tax upon the use, purchase or acquisition of property paid for out of the funds of any county or other political subdivision." (Emphasis added) See also Section 144.030, RSMo Supp.

This office in an opinion written to Mr. G. H. Bates, State Collector of Revenue, on August 9, 1946, held that the proper definition of the term "other political subdivision" as used above is found in Section 15, Article X, of the Missouri Constitution, which is as follows:

"The term 'other political subdivision', as used in this article, shall be construed to include townships, cities, towns, villages, school, road, drainage, sewer and levee districts and any other public subdivision, public corporation or public quasi-corporation having the power to tax."

Section 247.010, RSMo 1959, states that the purpose of authorizing public water supply districts is to make possible through public corporations conveniences in the use of water to the many inhabitants of this state now denied such privileges and thereby promoting public health and sanitation, make available conveniences not otherwise possible, and for the general public welfare.

Honorable Don R. Ferry

Section 247.020, RSMo 1959, states that such districts shall be political corporations of this state.

Public water supply districts are given the power through the county court to tax all taxable property within the district. Section 247.050 (11), (12), (13), (14) and 247.120, RSMo 1959,

Inasmuch as public water supply districts are designated as public corporations and political corporations of this state and are given the power of taxation within the district, it is our opinion such districts are included in the term other political subdivisions as this language is used in Section 39 (10), Article III, of our Constitution, and no sales or use tax may be levied upon purchases paid for directly out of the funds of the district. The purchase of plastic pipe and other materials necessary to install a water supply system made directly by the district falls within this exemption.

Inasmuch as a contractor who contracts to build an installation is liable for sales and use tax upon the materials used, as the ultimate consumer thereof, even though he is employed by an exempt organization, City of St. Louis v. Smith, Mo. Sup., 114 S.W.2d 1017, the exemption given to public water supply districts applies only to materials purchased directly by such districts out of their funds and owned exclusively by and for the exclusive use of the district. We do not rule upon the question presented when such materials are purchased by a contractor on behalf of a district under some kind of contract or agreement whereby title is taken by the district rather than the contractor.

Neither does this exemption apply to water districts formed for profit by individuals for the purpose of selling water to the public and which have no power of taxation.

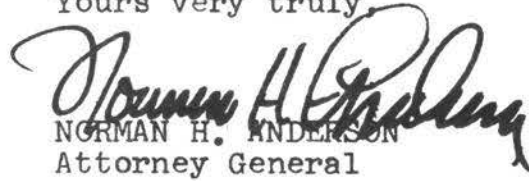
#### CONCLUSION

A public water supply district organized under the provisions of Chapter 247, RSMo 1959, is a "political subdivision" within the meaning of that term as used in Section 39 (10), Article III, Constitution of Missouri 1945, and such districts are not subject to sales or use tax for the purchase of materials or equipment made directly by the district out of its funds to be owned exclusively by and for the exclusive use of the district.

Honorable Don R. Ferry

The foregoing opinion, which I hereby approve, was prepared  
by my Assistant, John H. Denman.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

Enclosure:

OPINION NO. 552 (1966)  
112 (1967)  
Answered by Letter--  
Wilson

January 24, 1967

Honorable Thomas A. Walsh  
Representative, St. Louis City  
5850 Elizabeth  
St. Louis, Missouri



Dear Representative Walsh:

This is in answer to your request for an official opinion from this office dated December 15, 1966, in which you inquire whether a retired State Highway Patrolman now employed by the Department of Revenue is entitled to draw a pension from the Highway Employees and Highway Patrol Retirement System while he is employed by the Revenue Department.

We understand that this individual was retired from the State Highway Patrol prior to entering his current employment with the Department of Revenue.

Section 104.330, RSMo 1959, provides in part:

"1. As an incident to his contract of employment or continued employment, each employee of the state shall become a member of the system on the first day of the first month following the effective date of sections 104.-310 to 104.550, and every person thereafter becoming an employee shall become a member at the time of employment. \* \* \* "

Under this provision, one must be an "employee" in order to become a member of the Missouri State Employees' Retirement System. Therefore, we look at the definition of "employee" as defined in this chapter.

Section 104.310, RSMo 1959, defines the term "employee" as follows:

Honorable Thomas A. Walsh

"(15) 'Employee', any elective or appointive officer or employee of the state who is employed by a department and earns a salary or wage in a position normally requiring the actual performance by him of duties during not less than one thousand five hundred hours per year, including each member of the general assembly, but not including any employee who is covered under some other retirement or benefit fund to which the state is a contributor, except this definition shall not exclude any employee as defined herein who is covered only under the Federal Old Age and Survivors' Insurance Act, as amended. As used in sections 104.310 to 104.550, the term 'employee' shall include civilian employees of the Army National Guard or Air National Guard of this state who are employed pursuant to section 709 of title 32 of the United States Code and paid from federal appropriated funds; \* \* \* "

Under this definition, an employee who is covered under some other state retirement fund is specifically removed from the definition of "employee" as that term is used in Sections 104.310 to 104.550, which are the sections creating and defining the powers and duties of the Missouri State Employees' Retirement System.

In the case under inquiry, the retired State Highway Patrolman does not fit the definition of employee as set out above for the reason that he is covered under another retirement fund to which the state is a contributor, i.e., the Highway Employees and Highway Patrol Retirement System. Since he is not an employee as that term is defined, he does not become a "member" of the State Employees' Retirement System since, under Section 104.330, supra, only an "employee" may become a "member".

We are cognizant of the fact that Section 104.380, Subsection 4, RSMo 1959, provides that a retired member shall not continue in or be employed by a department for which a compensation is paid to the retired members. However, as noted above, because of the manner in which the term "employee" is defined, the individual here under consideration has never become a "member", and, therefore, Section 104.380 raises no barrier to his receiving retirement payments from the Highway Employees and Highway Patrol Retirement System.

We are also aware of Section 104.600, RSMo 1959, which allows an employee of either the Highway Employees and Highway Patrol Retirement System or the Missouri State Employees' Retirement System



Honorable Thomas A. Walsh

to transfer accumulated contributions and prior service credit from one system to the other if he becomes a member of the other system within 30 days after leaving his employment. We assume no such transfer has been attempted. Therefore, we do not pass on the applicability of this section to the instant situation.

CONCLUSION

It is the opinion of this office that a retired member of the Highway Employees and Highway Patrol Retirement System, who, subsequent to his retirement, becomes employed by the Department of Revenue, is entitled to continue to receive retirement benefits from the Highway Employees and Highway Patrol Retirement System.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

DRW/jlf

COURTS;  
MAGISTRATE COURTS:  
PROCESS:  
SERVICE OF PROCESS:

Magistrates lack the power or authority to appoint anyone other than public officers to serve any process other than summonses, and then only by a strict adherence to Section 517.100, RSMo 1959.

OPINION NO. 112 (1967)  
Opinion No. 553 (1966)

June 1, 1967

Honorable William C. Phelps  
State Representative, 4th District  
1701 Bryant Building  
Kansas City, Missouri 64106



Dear Representative Phelps:

This is in answer to your request for an opinion of this office on the question whether a magistrate judge can specially appoint persons to serve extraordinary process such as garnishments, executions, citations for examinations of debtor under oath, etc. You cite Section 506.140, RSMo. That statute, along with Supreme Court Rule 54.03, which supersedes said statute, taken in connection with Rule 41.02 and Rule 41.04, does not apply to magistrate courts.

Section 517.100, part of the magistrate code, provides as follows:

"Every magistrate or clerk of the magistrate court, upon being satisfied that any original summons issued out of his court will not be executed for want of an officer to be had in time to execute the same, or in all cases where the sheriff is a party to the pending suit or is otherwise interested in the determination thereof or to save mileage expense, may empower any suitable person designated by the plaintiff not being a party to the suit, to execute the same, by indorsement upon the process to the following effect:

At the request and risk of the plaintiff, I authorize . . . .  
. . . . . to execute this writ.

E. F. Magistrate  
Clerk of the magistrate court

Honorable William C. Phelps

And the person so empowered shall thereupon possess all the authority of a sheriff in relation to the service of such summons, and shall be subject to the same obligations, and shall receive the same fees for his services, except mileage."

By its terms the quoted statute applies only to the original summons in a magistrate court action. As to such original summons, any suitable person designated by the plaintiff who is not a party to the suit may be empowered by the magistrate to serve such summons after executing it by endorsement with words to the effect that at the request and risk of the plaintiff, "I authorize [insert the name of the process server] to execute this writ," to be signed by the magistrate and the clerk of the magistrate court.

In Miehl et al. vs. South Central Securities Co., 227 Mo.App. 788, 58 S.W.2d 1011, the court held that plaintiff's attorney was not a "party" to the suit and that a summons served by such attorney when designated by the court was legal.

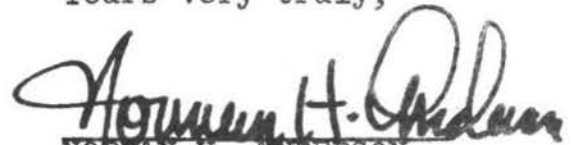
With respect to process other than summonses, the statutes do not provide for anyone other than sheriffs and constables and coroners to serve process. The Supreme Court of Missouri in Huff vs. Alsup et al., 64 Mo. 51, and in Fletcher v. Wear, 81 Mo. 524, ruled that the provisions of the statute authorizing a justice of the peace to designate someone to serve the original summons applied only to the original summons and not to garnishments, attachments, executions or the like.

#### CONCLUSION

It is the opinion of this office that magistrates lack the power or authority to appoint anyone other than public officers to serve any process other than summonses, and then only by a strict adherence to Section 517.100, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my assistant Donald L. Randolph.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

COUNTY HOSPITALS:  
BOARD OF TRUSTEES:  
BUDGET:

A county hospital established under the provisions contained in Sections 205.160 to 205.340 RSMo 1959 is governed by the requirements of Section 50.540, RSMo Cum. Supp., 1965, to the extent that the hospital board must submit its budget to the budget officer, but that said budget is not subject to revision as provided in Section 50.610 RSMo Supp., 1965.

554 (1966)  
OPINION NO. 113 (1967)

April 25, 1967

Honorable Lon J. Levvis  
Prosecuting Attorney  
Courthouse  
Mexico, Missouri



Dear Mr. Levvis:

This is in answer to your opinion request dated December 15, 1966, which request is, we presume, a copy of an inquiry directed to you from some member of the County Hospital Board of Trustees. The questions referred to are as follows:

"1. Was it the intent of the General Assembly that Audrain County Hospital, which employs a trained administrator and qualified staff to prepare its annual budget and which has a board of trustees of five people elected by the voters of Audrain County to approve and alter its annual budget, should have to submit the already approved budget for possible alteration by the county clerk and the county court? In general terms, isn't this the main provision of 50.540, 50.610 and 50.740 which go into effect January 1, 1967?"

"2. How can (and why should) the hospital board of trustees who has 'exclusive control of the expenditures of all moneys collected to the credit of the hospital fund. . . ' and who has control of hospital money placed in the hands of the county treasurer, according to 205.190, and who certifies to the county court what the hospital maintenance tax levy will be

according to 205.200, allow its efforts in approving a budget to be subjected to the approval, rejection, and/or alternation by gentlemen (county clerk and county court) who need no more qualification for preparing a budget to hold their positions than do the duly elected members of the board of trustees and its hired administrator?

"3. Would a vote (by me) for such submission be a vote against exclusive control of hospital money as provided in 205.190?

"4. Can the Board of Trustees of Audrain County Hospital, with exclusive control of this money, approve of this control being transferred and still be in compliance with 205.190?"

From your letter we assume that the Audrain County Hospital has been established as a county hospital operating under a Board of Trustees under Sections 205.160 to 205.340 RSMo 1959.

Under these sections, the Board of Trustees has exclusive control of expenditures of all money collected to the credit of the Hospital Fund and you question the recent statutes, Sections 50.540, 50.610 and 50.740 RSMo. Cum. Supp. 1965 which seem to necessitate an approval of your budget by the budget officer of your county.

It is apparent that the first question to be determined is whether or not the provisions of these Sections are applicable to your hospital.

Section 205.190 RSMo 1959 (7) provides that the board of hospital trustees "shall file with the county court of said county a report of their proceedings" and "a statement of all receipts and expenditures" and "shall certify the amount necessary to maintain and improve the hospital for the ensuing year."

Section 205.200 RSMo 1959, further provides that the county court shall levy annually a tax to defray the amount required as certified to the court by the Board of Trustees of the hospital.

Section 50.540, Laws of 1965, provides that in class three (3) and four (4) counties, "each department, office, institution,

commission or court of the county receiving its revenues in whole or in part from the county, shall prepare and submit to the budget officer estimates of its requirements for expenditures and its estimated revenues for the next budget year."

The primary purpose of this budget requirement is to provide "ways and means for a county to record the obligations incurred and thereby enable it to keep the expenditures within the income", Traub vs. Buchanan County, 108 S.W.2d 340, 342; and "to regulate the usual operation of the regular departments of Government whose needs could be foreseen and planned." State v. Smith, 182 S.W.2d 571, 574.

Sections 205.160 to 205.340 RSMo 1959, which give exclusive control of hospital funds to the hospital board of trustees is a special law and hence prevails over Sections 50.540, 50.610 and 50.740, Cum. Supp. 1965.

This latter is a general law and as a special law prevails over any contrary general law, your actions would be governed by Sections 205.160 to 205.340 RSMo 1959. Gross v. Merchants-Produce Bank, 390 S.W.2d 591, 599 states:

"It is also a law of construction that where two statutes treat of the same subject matter, one being special and the other general \* \* \* the special act will prevail in its application to the subject matter as far as it comes within the special provision."

It is our opinion, however, that under Section 50.540, you must submit your budget to the county budget officer, and this budget becomes a part of the comprehensive budget but is not subject to revision as authorized under Section 50.610. In other words, although you must submit your budget, it cannot be changed or altered.

Inasmuch as your hospital board is not governed by the provisions of Section 50.540, et al, except as noted herein, it is unnecessary to answer the other questions you have propounded.

#### CONCLUSION

It is the opinion of this office that a county hospital established under the provisions contained in Sections 205.160 to 205.340 RSMo 1959 is governed by the requirements of Section 50.540 RSMo Cum. Supp. 1965, to the extent that the hospital board must submit its budget to the budget officer, but that said budget is not subject to revision as provided in Section 50.610 RSMo Supp. 1965.

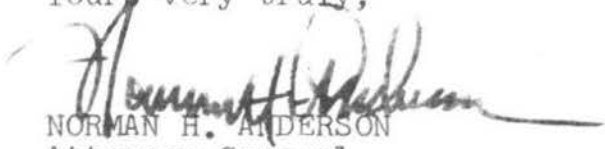


Honorable Lon J. Levvis

-4-

The foregoing opinion which I hereby approve was prepared by my assistant, O. Hampton Stevens.

Yours very truly,



NORMAN H. ANDERSON  
Attorney General

REAL PROPERTY: Facilities owned by schools and colleges, used  
SCHOOLS: exclusively as residences for students and/or  
TAXATION: faculty of the school, are exempt from property  
EXEMPTIONS: taxes by Section 137.100, RSMo if this use is  
PROPERTY: primarily for educational purposes and not only  
as housing facilities for the convenience and  
benefit of the students or faculty residing  
therein. The determination of what constitutes the primary use  
rests upon the facts of each individual case.

OPINION NO. 115

July 3, 1967

Honorable Jack L. Yocom  
Prosecuting Attorney  
Green County  
Springfield, Missouri 65802



Dear Mr. Yocom:

This is in answer to the request for an opinion of this office made by the former prosecuting attorney as to whether certain properties owned by the Central Bible College in Springfield, Missouri, are exempt from the assessment of property tax.

The property involved consists of fourteen residences owned by the college located immediately south of the college campus. Three of the residences are maintained for housing married students and the remaining eleven are occupied by faculty members and their families. We assume that each of the residences are single family units rather than multiple family or dormitory type buildings.

Section 6, Article X of the Missouri Constitution provides:

"Section 6. All property, real and personal, of the state, counties and other political subdivisions, and nonprofit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

This provision has been implemented by the enactment of

Honorable Jack L. Yocom

Section 137.100, RSMo 1959, which reads:

"(5) All property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable and not held for private or corporate profit, except that the exemption herein granted does not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom is used wholly for religious, educational or charitable purposes."

Thus the question is, is the residential property owned by Central Bible College used exclusively for schools and colleges and not for private or corporate profit and not held or used for investment.

It is generally recognized that property owned by an educational institution and used to house members of the faculty or as student dormitories is exempt from taxation when this use is primarily for promoting the purpose of the institution rather than as a convenience to the faculty or the students. 84 C.J.S. Taxation, Section 288d, pp. 582-584; 51 Am.Jur. Taxation, Section 622 p. There is some conflict in the application of this rule in that some courts have held that the primary use of residential property is in furtherance of the purpose of the exempt institution while others have found that this use is only incidental, the primary use of such facilities being for the convenience and benefit of the persons occupying the buildings. See cases cited in 15 ALR2d 1060.

The former view was adopted in *Midwest Bible and Missionary Institute v. Sestric*, Mo.Sup., 260 S.W.2d 25, wherein the Court held that a building used to house eighteen women students and four faculty members and their families (who paid no rent) was exempt from the property taxes saying; l.c. 30, 31:

"The chancellor could find from this evidence that the responsibility of the faculty of an institution, such as the plaintiff Institute is here shown to be, is not limited to the classroom alone. It here appears to be imperative that the more learned and mature and experienced faculty members influence and

Honorable Jack L. Yocom

mold the daily thinking and conduct and like of the youthful student. When resident under the same roof those student-faculty contacts are almost constant in dormitory life and clearly are promotive of the ends sought to be achieved by plaintiff's broad school program which it is the expressed constitutional and statutory policy of this State to encourage. It may be neither assumed nor concluded that under the instant facts the educational process of the plaintiff Institute makes no progress in the buildings here in issue. The contrary clearly and affirmatively appears. These students there live and study, prepare assignments, make research, have faculty conferences and meet in discussion groups with faculty guidance. We think the above constitutional provision must be so construed and the above statute so applied under the instant facts as to exempt the properties here in issue as portions of the entire integrated system of the plaintiff Institute, and not merely to exempt the buildings located at 3964 Washington Boulevard where classes are held and lessons are recited. State ex rel. Spillers v. Johnston, supra."

This holding was based in part upon the decision in State ex rel. Spillers v. Johnston, Mo.Sup., 113 S.W. 1083, in which a Kemper Military Academy building at Boonville, Missouri, which housed 110 cadet students, 10 faculty officers, 15 servants and defendant and his family to be tax exempt.

In an older case, Bishop's Residence Co. v. Hudson, Mo.Sup., 4 S.W. 435, 91 Mo. 671, the Court held property used as a place of residence, rent free, for such Bishops of the Methodist Episcopal Church as might from time to time be designated to reside in the City of St. Louis, to be exempt from property taxes.

Similarly, on August 19, 1953, our office issued opinion numbered 31 to the Honorable W. C. Frank, Prosecuting Attorney of Adair County, holding that a non-profit educational institution's dormitories and some other buildings used for housing facilities for its students were exempt from property taxes when no space is rented to any others for residential or business purposes and the transaction was not entered into by the colleges for investment purposes.

However the decisions we have cited have involved large

Honorable Jack L. Yocom

dormitory type facilities housing a group of students and several faculty members. The reasons given for finding that these facilities are used primarily in furtherance of education rather than for the benefit of those residing therein, is that the regulation of the students by the faculty and the increased opportunities for group study and consultation with the faculty is of great aid in promoting the educational process.

This general thesis does not necessarily apply to single residence property. It is more difficult to see how furnishing a married student a house to live in provides an educational benefit superior to that obtainable in a privately owned residence equally available to such a student. The same question is also applicable to single family faculty residences. Although in the memorandum enclosed with the opinion request prepared by those seeking a tax exemption for the property, evidence was given as to the use of the faculty residences for conferences and consultations between the faculty and students, the question arises as to the availability for such conferences of faculty members living in houses other than those owned by the colleges.

This memorandum cites the recent case of Bethesda General Hospital v. State Tax Commission, Mo.Sup., 396 S.W.2d 631 in which the Court held to be tax exempt certain residential property occupied by various supervisors of maintenance and their families, a laboratory technician, a registered nurse and a house physician and family. The rationale of this holding was that these persons were key personnel, on call twenty-four hours a day, and were necessary to the efficient operation of the hospital, for the continuance of which it was likewise necessary that they be located near its grounds. This holding would not necessarily be applicable to the general question as to the exempt status of college owned residential property absent special circumstances in which the instant availability of the faculty was as necessary to the purpose of the college as are certain key personnel of a hospital.

It is well recognized that provisions exempting property from taxation should be strictly, yet reasonably construed, and each claim for exemption must rest upon the particular facts of that case. Frisco Employees' Hospital v. State Tax Commission, Mo.Sup., 381 S.W.2d 772. In cases regarding student or faculty residences, the general rule is that they are exempt under Section 137.100 if they are used primarily in furtherance of the educational purposes of the college and their use as a residence is only secondary. The application of this rule depends upon the facts in each case, which may be determined by court proceedings, or, if he so desires, by the county assessor with the advice of the prosecuting attorney. Without knowing all of the facts, this office does not feel it

Honorable Jack L. Yocom

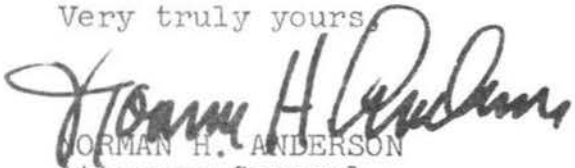
could make an accurate determination of whether specific property should be exempted from property taxes.

CONCLUSION

Facilities owned by schools and colleges, used exclusively as residences for students and/or faculty of the school, are exempt from property taxes by Section 137.100, RSMo if this use is primarily for educational purposes and not only as housing facilities for the convenience and benefit of the students or faculty residing therein. The determination of what constitutes the primary use rests upon the facts of each individual case.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General



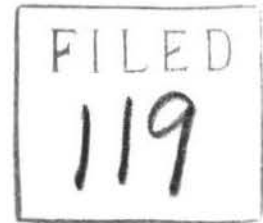
RELIGIOUS ORGANIZATIONS:  
TAXATION:  
EXEMPTIONS:  
SALES AND USE TAXES:

Purchases of construction materials by a religious organization to be turned over to a contractor for use in building a church are purchases made in the conduct of regular religious functions and activities of the organization and are exempt from sales and use taxes under Section 144.040, RSMo 1959.

March 30, 1967

OPINION NO. 119 (1967)  
OPINION NO. 562(1966)

Honorable George J. Donegan  
State Representative - 143rd District  
State of Missouri  
Capitol Building  
Jefferson City, Missouri



Dear Representative Donegan:

This is in answer to your request for an opinion of this office relating to the liability of the St. Mary's Church or its sole corporate owner, Ignatius J. Stricker Bishop of Springfield - Cape Girardeau, both herein referred to as the "Church" for sales or use taxes on purchases for materials to be used to build a church. In your letter you state that the materials in question are purchased by the Church itself rather than by the contractor and the Church takes direct title to the materials which are then furnished to the contractor for his use in constructing the church.

A tax upon the sale at retail of tangible personal property is imposed by Section 144.020, RSMo Supp. 1965, which reads in part as follows:

"1. A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state. The rate of tax shall be as follows:

(1) Upon every retail sale in this state of tangible personal property a tax equivalent to three per cent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to three per cent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange; except as otherwise provided in section 144.025;"

\* \* \* \* \*

Exemptions from this tax for religious and charitable institutions are provided in Section 144.040, RSMo 1959, as follows:

"In addition to the exemptions under section 144.030 there shall also be exempted from the provisions of sections 144.010 to 144.510 all sales made by or to religious, charitable, eleemosynary institutions, penal institutions and industries operated by the department of penal institutions or educational institutions supported by public funds or by religious organizations, in the conduct of the regular religious, charitable, eleemosynary, penal or educational functions and activities, and all sales made by or to a state relief agency in the exercise of relief functions and activities."

(No reference is made to the use tax statutes, as the determination of the sales tax question would apply equally to use taxes; Section 144.615, RSMo Supp. 1965.)

Although the fact that the Church is a religious institution within the meaning of Section 144.040 is not questioned, the Department of Revenue has refused to grant a tax exemption to the Church on the ground that buying building materials to be used by an independent contractor to build a church is not in the "conduct of the regular religious . . . functions and activities" of the church.

A thorough search of the various sales tax decisions in this and other states reveals no case in which this question was raised. The Department of Revenue has consistently, and we think correctly, required that sales or use taxes be paid by a contractor who buys materials to be used in building churches, buildings for charitable institutions, state office buildings and other institutions which may themselves be exempt from payment of such taxes even though the cost of the tax will be transferred to the exempt organization. This is done on the theory that the contractor who buys the materials as the ultimate consumer is liable for such taxes even though the materials are to be used for the benefit of exempt organizations. See *City of St. Louis v. Smith*, Mo. Sup., 114 SW2d 1017.

However, in this case, it is not the contractor but the exempt organization who is buying the materials. It is my understanding that members of the church are buying the materials directly and are not acting through the contractor. In such a case the contractor is not the ultimate consumer but the exempt Church is.

Honorable George J. Donegan

To say that buying construction materials is not a regular function or activity of the Church is not sufficient to deny its exempt status. It is true that building (or repairing) a church is not one of its usual activities, but when it is necessary, one could not say that building a church is not a part of its religious functions or activities.

To say that a church is not in the construction business is like refusing to exempt a church from paying taxes on furniture for the parsonage or an automobile for the pastor because a church is not in the furniture or automobile business. The materials in each case are used, directly or indirectly, to facilitate the regular religious activities of the church. It is certainly necessary to have a church building to conduct the affairs of the church.

The fact that materials will be purchased to construct a church only once or for repairs only at extended intervals does not detract from the "regularity" of the activity. If the purchase is necessary for carrying on the business of the church, it may be within the conduct of its regular religious functions and activities even though made rarely or at irregular intervals.

Causing a church building to be constructed is part of the regular religious functions of a church and the fact that the church chooses to purchase the construction materials itself rather than allowing the contractor to do so does not cause the church to lose its exempt status in regard to the purchase of such materials.

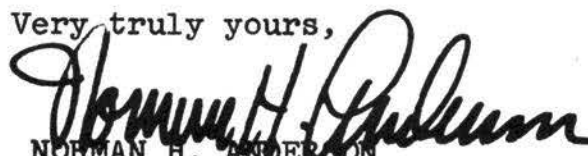
This opinion does not rule upon the question presented when building materials are purchased by a contractor on behalf of an exempt organization under some kind of a contractual agreement whereby title is taken by the exempt organization rather than the contractor.

#### CONCLUSION

Purchases of construction materials by a religious organization to be turned over to a contractor for use in building a church are purchases made in the conduct of regular religious functions and activities of the organization and are exempt from sales and use taxes under Section 144.040, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

FEDERAL GRANTS:  
COMMISSION ON HIGHER  
EDUCATION:

Missouri Commission on Higher Education is empowered and authorized to receive and utilize federal grants under the Federal Higher Education Facilities Comprehensive Planning Grants Program.

Opinion No. 563 (66)  
Answered by Letter (DeFeo)

Opinion No 120 (67)

January 9, 1967

Dr. Ben Morton, Executive Secretary  
Missouri Commission on Higher Education  
600 Clark Avenue  
Jefferson City, Missouri

120

Dear Dr. Morton:

This letter is in response to your request for our opinion as to the authority of the Missouri Commission on Higher Education to receive federal grants under the Higher Education Facilities Comprehensive Planning Grants Program.

As you are aware, the Federal Higher Education Facilities Act of 1963 (P.L. 88-204; 20 U.S.C. 701 et seq.) has been recently amended by Congress (P.L. 89-752) to provide for grants to state commissions for comprehensive planning as to the construction needs of institutions of higher education.

Section 173.050, RSMo Supp. 1965, defines relevant powers of the Missouri Commission on Higher Education, to wit:

"The Missouri commission on higher education shall be authorized to:

"(1) Serve as the official state agency to plan for, define and recommend policies concerning the allocation of federal funds where such funds, according to provisions of federal legislation, are to be received and allocated through an official state agency;

"(2) Apply for, receive, and utilize funds which may be available from private nonprofit foundations and from federal sources for research on higher education needs and problems in the state;

Dr. Ben Morton, Executive Secretary -

"(3) Subcontract for research and planning services from individuals, colleges or universities, or nonprofit corporations."

On December 23, 1963, the governor designated the Missouri Commission on Higher Education as the "State Commission" pursuant to Section 105(a), of the Higher Education Facilities Act.

Based on the foregoing, it is the opinion of this office that Missouri Commission on Higher Education is empowered and authorized to receive and utilize federal grants under the Federal Higher Education Facilities Comprehensive Planning Grants Program.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

By LOUIS C. DEFEO, JR.  
Assistant Attorney General

LCD:df



March 6, 1967



Honorable Kenneth J. Rothman  
State Representative, 8th District  
Room 410, Capitol Building  
Jefferson City, Missouri

Dear Mr. Rothman:

This is in response to your request dated December 29, 1966, for an opinion respecting a proposed bill which would permit a vote in St. Louis County for the adoption of the Missouri Non-Partisan Court Plan. You have asked the question whether the proposition can be submitted to the voters of the county at a general primary election during the month of August, 1968.

The relevant provision of Article V, Section 29(b) of the Constitution provides:

"At any general election the qualified voters of any judicial circuit outside of the City of St. Louis and Jackson County, may by a majority of those voting on the question elect to have the judges of the courts of record therein appointed by the governor in the manner provided for the appointment of judges to the courts designated in Section 29 (a). The general assembly may provide the manner in which the question shall be submitted to the voters."

It is to be noted that Section 29(b) commences: "At any general election \* \* \*", further the section concludes with the sentence "The general assembly may provide the manner in which the question shall be submitted to the voters."

In essence the problem then is what is meant by the language "any general election" in Section 29(b), Article V and can the Legislature in enacting enabling legislation to



Honorable Kenneth J. Rothman

carry out the provisions of Section 29(b) authorize the voters to adopt the non-partisan court plan at a time other than the 1968 general election held in November of 1968. Section 1.020, RSMo 1959, under definition 3, provides:

"(3) 'General election' means the election required to be held on the Tuesday succeeding the first Monday of November, biennially;"

We have found no cases which have construed the precise meaning of Section 29(b), Article V. One case in Missouri has discussed at some length the distinction between the general and special elections as applied to the St. Louis City Election Laws. In *Dysart vs. St. Louis*, 11 S.W.2d 1045, the Supreme Court was considering the situation which arose because of an election for a bond issue which was held in St. Louis City on August 7, 1928, the date of the regular primary election which was the first Tuesday in August. It was contended by those attempting to nullify the bond issue that the provision of the law relating to registration applicable to St. Louis had been violated because there was no previous revision of the registration of voters as required by Section 40 of the St. Louis Election Laws which provided that there must be a previous revision of the registration before any special election at which is submitted a proposition to increase the indebtedness of the city. The Court there held that a primary election is a general election. The Court considered the definition of general election now appearing in Section 1.020, supra, and the case of *Hass vs. Neosho*, 139 Mo. App. 292, which held that a primary election is not a "general election", but held in effect that any election including a primary election regularly held is a general election and that a special election is one not provided for to occur at regular intervals. The court held that any local election may be either general or special and that this wipes out the definition of general election found in Section 1.020. The court then stated that insofar as St. Louis City election laws are concerned there is no distinction between a primary and any other general election. The court did in the *Dysart* case while considering the construction to be placed upon the St. Louis City Election Laws conclude that under that law the August primary election is a regular general election within the meaning of that law. However, this is not very helpful, in our view in construing the meaning of Section 29(b) of the Constitution. Since, however, this is the only authority that points in this direction and since Section 29(b) provides that the general assembly may provide the manner in which the question shall be submitted to the voter, we conclude that the framers of the Constitution

Honorable Kenneth J. Rothman

intended to grant plenary power to the general assembly to decide at what election and in what manner the proposition should be submitted to the voters. We think it may be inferred that the Constitution does not authorize the Legislature to submit the proposition at a special election called solely for that purpose.

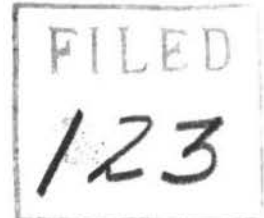
We therefore conclude that in the light of the ambiguous language we find in Section 29(b), Article V and the arguable language which we find in the Dysart case that it is within the power of the Legislature to authorize the proposition for submission of the Non-partisan Court Plan to be submitted to the voters of St. Louis County at the regular August Primary Election of 1968.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

Opinion No.123 (1967)  
No. 566 (1966)  
Answered by Letter (Siddens)

January 13, 1967



Honorable William R. Clark  
Chairman, Missouri Public Service Commission  
Jefferson Building  
Jefferson City, Missouri

Dear Judge Clark:

Responding to your opinion request dated December 28, 1966, respecting interpretation of Attorney General's Opinion No. 407 to Honorable Warren E. Hearnes, dated December 8, 1966, we think it manifest that the Public Service Commission was inadvertently omitted from the list of agencies appearing on Page 11 of said opinion as among those not under the direct control of the Governor.

Yours very truly,

---

NORMAN H. ANDERSON  
Attorney General

Enclosure

COUNTY TREASURER:

DEPUTIES:

ASSISTANTS:

COUNTY COURT:

SECOND CLASS COUNTIES:

A county treasurer of a second class county must submit his deputy and assistant appointments to the county court pursuant to Section 54.230, RSMo 1959.

See: State ex rel. Lack v. Melton, 629 S.W.2d 302 (Mo. banc 1985).

OPINION NO. 124(1967)

May 2, 1967

Honorable Lawrence O. Davis  
Prosecuting Attorney  
Franklin County  
County Court House  
Union, Missouri



Dear Mr. Davis:

Recently your predecessor requested an opinion from this office concerning the interpretation of Section 54.230, RSMo 1959. The letter, in part, stated:

"The County Treasurer of Franklin County has requested a Deputy Treasurer for his office as he feels the same is necessary for the prompt and proper discharge of his office. He has been informed by the County Court that it is the opinion of the Court that an Assistant or Deputy is not necessary.

"The question that we would like answered at this time is whether or not, if it is determined by the County Treasurer that he does need a Deputy, if the County Court has the authority to refuse the same."

The prime rule of statutory interpretation is well stated in Turner vs. Kansas City, Mo., 191 S.W.2d 612 (1.c. 617):

" . . . The ascertainment of the intention of the lawmaker is the primary and fundamental factor in the construction of statutes . . . "

In order to determine the legislative intent of a statute, the language used should usually be given its plain and ordinary meaning. Baker vs. Brown's Estate, Mo., 294 S.W.2d 22.

Honorable Lawrence O. Davis

Keeping in mind these guide lines, we examine the language of Section 54.230, supra, pertaining to second class counties:

"The county treasurer, of a county of the second class, shall be entitled to have and to appoint such a number of deputies and assistants as the county treasurer, with the approval of the county court, may deem necessary for the prompt and proper discharge of his office, and they shall be paid such salaries as may be fixed by the county treasurer with the approval of the county court. The salaries of all such deputies and assistants shall be paid by the county in the same manner as the salary of the county treasurer is paid."  
(Emphasis added.)

The emphasized language above presents the question for construction and could be interpreted in two ways:

1. That the county treasurer has an unqualified right to appoint deputies and assistants and the county court's approval is simply ministerial.
2. That the county treasurer's right to appoint deputies and assistants is a qualified right which requires the approval of the county court in the exercise of its discretion.

The question to be decided then is whether or not, pursuant to Section 54.230, supra, the county court's function is ministerial or discretionary.

A search of the cases reveals that this question has not been presented to the courts concerning Section 54.230, supra, or its predecessor, Section 13800, R.S. 1939, which was amended in 1945 to its present form. Laws, 1945, p. 1561, Section 2. However, the Supreme Court of Missouri has ruled on a very similar question involving the appointment of deputy county clerks in Whalen vs. Buchanan County, Mo., 111 S.W.2d 177.

The court in the Whalen case, supra, was faced with the construction of Section 11857, R.S. 1929, (13489, R.S. 1939) which

Honorable Lawrence O. Davis

in part reads as follows:

"The collector of revenue, clerk of the circuit court, assessor, recorder of deeds, county treasurer, and any other county officer, shall each be entitled to such a number of deputies and assistants, to be appointed by said county officer, as the county court may deem necessary for the prompt and proper discharge of the duties of their various offices,  
... " (Emphasis added.)

The Court stated (l.c. 180):

" . . . In the first place, section 11856, supra, gives the county clerk the right to appoint a chief deputy and fixes the salary. It says nothing about classification. Section 11857 does provide for classification and fixes salaries for each class. It seems to imply, also, that the county court may exercise discretion as to the number of deputies and assistants the clerk may appoint. But, if we are to give full effect to both sections, section 11857 cannot be held to authorize 'classification,' as therein provided, of a 'chief deputy,' provided for by section 11856, as a 'Class A' deputy under section 11857, because section 11856 authorizes the clerk to appoint a 'chief deputy' at a salary of \$1,920 per year, leaving, if construed by itself, nothing for the county court to do but pay the salary fixed by the statute, while section 11857 fixes the salary of 'Class A' deputies at \$1,680 per year and lower salaries for deputies or assistants in classes B and C therein provided for. If section 11857 (assuming that it applies to county clerks) be construed to mean all deputies, including the 'chief deputy' provided for in section 11856, there would be repugnancy between the two sections. By construing section 11857 (as applied to county clerks) as referring to deputies and assistants other than the 'chief deputy' specifically provided for by section 11856, such repugnancy is avoided. We so construe it." (Emphasis added.)



Honorable Lawrence O. Davis

This long quote from the Whalen case is necessary to demonstrate when the county court could exercise its discretion in approving deputies for county officers and where it could not. According to Section 11856, R.S. 1929, a county clerk could as a matter of right appoint a "chief deputy" and set his salary. The appointment of other deputies and assistants must be subject to the discretion of the county court. The office of the county treasurer was also controlled by Section 11857, R.S. 1929, and the holding in Whalen vs. Buchanan County, supra, would have undoubtedly been applicable law.

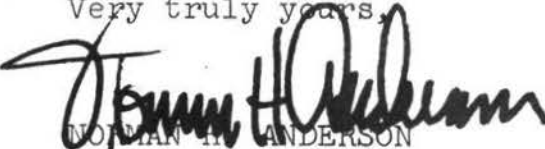
The present law, Section 54.230, does not provide for a "chief deputy" and therefore the approval of all deputies and assistants to the office of county treasurer now falls within the discretion of the county court and the treasurer is not entitled to have such as a matter of right.

#### CONCLUSION

It is therefore the opinion of this office that a county treasurer of a second class county must submit his deputy and assistant appointments to the county court pursuant to Section 54.230, RSMo 1959. Such appointment is not valid until approved by the county court and that approval is within the sound discretion of the county court.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, William A. Peterson.

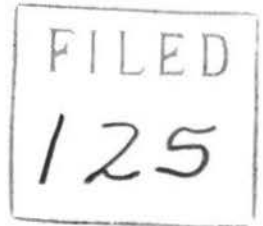
Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

PROSECUTING ATTORNEYS: Only one assistant prosecuting attorney may be appointed in third and fourth class counties.

February 2, 1967

OPINION NO. 125



Honorable Fielding Potashnick  
Prosecuting Attorney  
Scott County  
County Courthouse  
Sikeston, Missouri

Dear Mr. Potashnick:

In your letter of January 3, 1967, you requested an opinion from this office as follows:

"Section 56.240 provides in substance that the Prosecuting Attorney, counties of the third class, may appoint one Assistant Prosecuting Attorney, etc.

"May a Prosecuting Attorney of a county of the third class, which contains more than 30,000 inhabitants, appoint a second Assistant Prosecuting Attorney to serve without compensation from the County or State?"

Scott County is a third class county with a population of 32,748.

Section 56.240, RSMo Cum. Supp. 1965, provides that the prosecuting attorney in counties of the third and fourth class may appoint one assistant prosecuting attorney who shall take the oath or affirmation of office as required of the prosecuting attorney. You inquire whether the second assistant may be appointed by you to serve without compensation. We assume that your question concerns the appointment of an assistant prosecuting attorney who is to be vested with the full duties and responsibilities of an assistant prosecuting attorney.

Honorable Fielding Potashnick

In 67 C.J.S., Officers, § 148 (a) the rule of law concerning the appointment by a public officer of deputies and assistants is stated in part as follows:

"Public power may not be delegated to private persons or corporations, over whom no supervision is maintained, nor may the discharge of the duties of public officers ordinarily be so delegated, and it has been held that a public officer may not delegate his official duty to another than a deputy. Moreover, an officer may not delegate to an agent power to do an act required by statute involving judgment and discretion. As a rule, however, public officers may appoint deputies for the discharge of ministerial duties, except where the law requires the duty to be performed by the principal in person."

The Supreme Court of this State has pronounced a similar doctrine in *Small v. Field*, 102 Mo. 104, 14 S.W. 815, in discussing the authority for the appointment of a deputy court clerk, the court stated, l.c. 118:

"And it is also said by the appealing defendants that no provision is anywhere to be found in those statutes for the appointment of a deputy for a territorial district court. But at common law a ministerial officer had authority to appoint a deputy. Com. Dig.--Tit. Officer (D.I.); Am. & Eng. Cyclop. of Law--Tit. Deputy, 624. Thus, a sheriff, though his patent of office does not say he may execute his office per se vel sufficientem deputatum suum, yet he may make a deputy. 7 Bac. Ab.--Tit. Offices & Officers, 316 (L).

"The office of clerk of a court seems to be one which, from its nature and constitution, implies a power or right to execute it by deputy. Whenever nothing is required but superintendency in office a ministerial officer may make a deputy. 7 Bac. Abr. 316, 317,--Tit. Offices and Officers. And the rule is general that a deputy may do every act which his principal might do. Com. Dig. Officers, D. 3; Confiscation Cases, 20 Wall. 92."

It, thus, appears that the authority of a public officer to appoint a deputy or an assistant depends upon the duties that are to be delegated. The source or lack of compensation is immaterial in determining whether the appointment can be made.

Honorable Fielding Potashnick

Certainly the duties of the prosecuting attorney are not ministerial but are considered as quasi judicial with discretionary powers. In *State v. Smith*, 258 S.W.2d 590, the Supreme Court in discussing the office of prosecuting attorney and his duties and authority stated, l.c. 593:

"[2-5] When the law, in terms or impliedly, commits and entrusts to a public officer the affirmative duty of looking into facts, reaching conclusions therefrom and acting thereon, not in a way specifically directed, [i. e., not merely ministerially] but acting as the result of the exercise of an official and personal discretion vested by law in such officer and uncontrolled by the judgment or conscience of any other person, such function is clearly quasi judicial. This court has written much upon the broad discretion vested in a public prosecutor. *State on Inf. of McKittrick v. Wymore*, supra; *State on Inf. of McKittrick v. Wallach*, 353 Mo. 312, 182 S.W.2d 313, 318, 319. In this jurisdiction it is recognized that this public office is one of consequence and responsibility. The status of the prosecuting attorney as a public officer is given dignity and importance by our statutes. Sections 56.010 to 56.620 RSMo 1949, V.A.M.S. With every other attorney at law a prosecuting attorney is, of course, an officer of the court in a larger sense; but he is not a mere lackey of the court nor are his conclusions in the discharge of his official duties and responsibilities, in anywise subservient to the views of the judge as to the handling of the State's cases. A public prosecutor is a responsible officer chosen for his office by the suffrage of the people. He is accountable to the law, and to the people. He is 'vested with personal discretion intrusted to him as a minister of justice, and not as a mere legal attorney. He is disqualified from becoming in any way entangled with private interests or grievances in any way connected with charges of crime. He is expected to be impartial in abstaining from prosecuting as well as in prosecuting, and to guard the real interests of public justice in favor of all concerned.' *Engle v. Chipman*, 51 Mich.

Honorable Fielding Potashnick

524, 16 N.W. 886, 887. 'The sovereign power of government can only be exercised through its officers. Consequently, to each officer is delegated some of the powers and functions of government. Usually a discretion that is within the power granted to an officer cannot be controlled by other officers.' State ex rel. Thrash v. Lamb, 237 Mo. 437, 141 S.W. 665, 669."


In Elliott v. Jackson County, 194 Mo. 532, the Supreme Court held that when the statute provides for a chief deputy prosecuting attorney to be appointed, the appointment of a second chief deputy would be without authority of law.

#### CONCLUSION

It is the opinion of this office that the prosecuting attorney in a third or fourth class county is authorized to appoint only one assistant.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

DEPARTMENT OF REVENUE:  
RECORDS:  
STATE RECORDS COMMISSION:

The disposition of state records, regardless of pre-existing laws, is now governed by rules and regulations promulgated by the State Records Commission pursuant to Section 109.310, RSMo Supp. 1965, after the effective date of the adoption of such rules and regulations.

OPINION NO. 127

May 9, 1967

Honorable Thomas A. David  
Director  
Department of Revenue  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. David:

This is in answer to your request for an opinion of this office regarding the authority of the Director of Revenue to photostat and then destroy the original records and documents referred to in Section 301.360, RSMo 1959, which reads as follows:

"The director of revenue may destroy the following records:

"(1) All surrendered or assigned certificates of ownership of motor vehicles and trailers after ten years;

"(2) All applications for transfer of registrations of motor vehicles and trailers and all alphabetical and numerical files of records relating to the registration of motor vehicles and trailers after five years;

"(3) All applications for drivers licenses after four years;

"(4) All applications for registration of motor vehicles and dealers after one year;



Honorable Thomas A. David

"(5) Any other records relating to manufacturer's and dealer's registration of motor vehicles and trailers, which in the discretion of the director of revenue should be destroyed after ten years;

"(6) The applications for registrations of chauffeurs, registered operators and certificates of ownership shall be preserved as permanent records."

In 1965 the legislature enacted Sections 109.200 through 109.310, RSMo Supp. 1965, entitled "The State Records Law". This act created the State Records Commission and authorized it to determine what disposition should be made of the various records and documents of the state. Section 109.310, RSMo Supp. 1965, thereof provides:

"Records shall be destroyed according to the provisions of existing law and administrative regulations until the state records commission promulgates rules and regulations for the destruction of records. All provisions of law and all administrative rules and regulations for the destruction of records are repealed upon the effective date of the rules and regulations for the destruction of records adopted and promulgated by the commission pursuant to sections 109.200 to 109.310."

Thus, it may be seen that regardless of pre-existing laws relating to the destruction of records, this matter is now governed by the State Records Law, and after the promulgation of rules and regulations by the State Records Commission, records may be destroyed only according to the provisions of such rules and regulations. See our Opinion No. 351, issued November 1, 1966, to the Honorable James C. Kirkpatrick, Secretary of State, a copy of which is enclosed herewith. It is our understanding that regulations have been made for the destruction of the records set forth in Section 301.360. You should consult the State Records Commissioner to determine the procedure for the destruction of the particular records about which

Honorable Thomas A. David

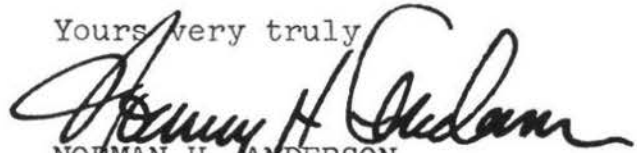
you inquired, and you are no longer bound by the requirements of Section 301.360.

CONCLUSION

The disposition of state records, regardless of pre-existing laws, is now governed by rules and regulations promulgated by the State Records Commission pursuant to Section 109.310, RSMo Supp. 1965, after the effective date of the adoption of such rules and regulations.

The foregoing opinion, which I hereby approve, was prepared by my Assistant John H. Denman.

Yours very truly



NORMAN H. ANDERSON  
Attorney General

Enclosure: Opinion No. 351, Kirkpatrick  
11-1-66

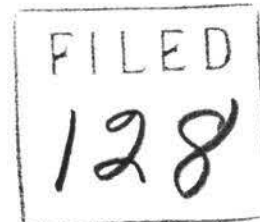
COUNTY HOSPITAL: County hospital trustees have exclusive  
MAINTENANCE FUND: BALANCE: control and expenditure of all money  
COUNTY COURT CANNOT TRANSFER: collected to credit of county hospital  
fund under Section 205.190, RSMo Cum.

Supp. 1965, including taxes levied for hospital maintenance, under  
Section 205.200, RSMo Cum. Supp. 1965. Tax levy under said section may  
be used for maintenance, improvement, construction and furnishing  
necessary hospital additions. Said tax proceeds shall be used for pur-  
pose for which tax levied and none other. County court is unauthorized  
to transfer unused balance of hospital maintenance fund to county road  
and bridge fund or to county revenue fund.

OPINION NO. 128

May 31, 1967

Honorable Zane White  
Prosecuting Attorney  
Phelps County  
Rolla, Missouri



Dear Mr. White:

This office is in receipt of your request for a legal opinion,  
reading as follows:

"It has been brought to their attention [County  
Court] that there may be a surplus of money in  
the maintenance account of the Phelps County  
Memorial Hospital. This is supported by a tax  
levy of Phelps County tax payers.

The Phelps County Court would like to know if  
this surplus could be transferred to the County  
Road and Bridge Fund or County Revenue Fund,  
if it were agreeable to all parties concerned?"

Section 50.020, RSMo 1959, provides when the county court may  
order an unused balance remaining in a county fund transferred to  
another fund and reads as follows:

"Whenever there is a balance in any county  
treasury in this state to the credit of  
any special fund, which is no longer needed  
for the purpose for which it was raised,  
the county court may, by order of record,  
direct that said balance be transferred to  
the credit of the general revenue fund of  
the county, or to such other fund as may,  
in their judgment, be in need of such bal-  
ance."

Section 50.030, RSMo 1959, construes the preceding section, and reads as follows:

"Nothing in section 50.020 shall be construed to authorize any county court to transfer or consolidate any funds not otherwise provided for by law, excepting balances of funds of which the objects of their creation are and have been fully satisfied."

Section 50.030, supra, specifically provides that nothing in Section 50.020, supra, shall be construed to authorize the county court to transfer or consolidate any funds not otherwise provided for by law.

It is believed the county hospital fund and any surplus of same, has been otherwise provided for by law within the meaning of Section 50.030, supra, and that Sections 50.020 and 50.030, are inapplicable and no authority for transfer of any surplus hospital funds.

In this connection we call your attention to a portion of Section 205.190, RSMo Cum. Supp. 1965, referring to the duties of county hospital trustees, and reading as follows:

"\* \* \* They shall have the exclusive control of the expenditures of all moneys collected to the credit of the hospital fund, and of the purchase of site or sites, the purchase or construction of any hospital buildings, and of the supervision, care and custody of the grounds, rooms or buildings purchased, constructed, leased or set apart for that purpose; provided, that all moneys received for such hospital shall be deposited in the treasury of the county to the credit of the hospital fund, and paid out only upon warrants ordered drawn by the county court of said county upon the properly authenticated vouchers of the hospital board.\* \* \*"

From the above quoted portion of Section 205.190, it clearly appears the hospital board of trustees have been given exclusive control of the hospital fund, and it can be paid out only upon warrants ordered by the county court, and then only, when properly authenticated vouchers are first presented to the court, the hospital board and not the county court has exclusive control over the hospital fund and expenditures of same.

Section 205.200 RSMo Cum. Supp. 1965, provides as follows:

"1. Except in counties operating under the charter form of government, the county court in any county wherein a public hospital shall have been established as provided in sections 205.160 to 205.340, shall levy annually a rate of taxation on all property subject to its taxing powers in excess of the rates levied for other county purposes to defray the amount required for the maintenance and improvement of such public hospital and for constructing and furnishing necessary additions thereto, as certified to it by the board of trustees of the hospital; the tax levied for such purpose shall not be in excess of twenty cents on the one hundred dollars assessed valuation. The funds arising from the tax levied for such purpose shall be used for the purpose for which the tax was levied and none other.

"2. Any funds of the hospital, whether derived from the tax authorized by this section or from the operation of the hospital, and whether collected before or after October 13, 1965, may be used for constructing and furnishing necessary additions to the hospital."

Phelps County does not operate under a charter form of government, and Section 205.200, supra, is applicable to said county.

In view of the fact the board of trustees of the Phelps County Memorial Hospital, and not the county court of Phelps County have exclusive control over the hospital fund, including taxes levied for maintenance of said hospital under provisions of Section 205.200, supra, and also in view of the fact any funds arising from a tax levy under said section can be used for the purpose provided by said section, such as maintenance, improvement, constructing, and furnishing necessary additions to the hospital, and for no other purpose, the Phelps County Court is unauthorized to transfer any unused balance remaining in the maintenance fund of the Phelps County Memorial Hospital, to the County Road and Bridge Fund, or to general revenue of said Phelps County.

#### CONCLUSION

Therefore, it is the opinion of this office that the board of trustees of a county hospital has exclusive control over all

Honorable Zane White

-4-

money collected to the credit of the hospital fund and of the expenditure of same as provided by Section 205.190, RSMo Cum. Supp. 1965, including taxes levied for the maintenance of the hospital, under provisions of Section 205.200, RSMo Cum. Supp. 1965. A tax levy made under provisions of said section may be used for maintenance, improvement, construction and furnishing necessary additions to the hospital, and such proceeds, shall be used for the purpose for which the tax was levied and none other. The county court is not authorized to transfer any unused balance remaining in the hospital maintenance fund to the county road and bridge fund or to the county revenue fund.

The foregoing opinion which I hereby approve was prepared by my Assistant, Paul N. Chitwood.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Norman H. Anderson", written in a cursive style.

NORMAN H. ANDERSON  
Attorney General



SCHOOL DIRECTORS:  
JURY SERVICE:

Members of the Board of Education of six-director school districts are not excused from jury service by the provisions of Section 494.031(7), RSMo 1959.

OPINION NO. 131

March 30, 1967

Honorable A. Basey Vanlandingham  
Missouri State Senator  
12 Glenview Plaza  
P. O. Box 711  
Columbia, Missouri



Dear Senator Vanlandingham:

This opinion is issued in response to your request for an official ruling. You inquire as to whether or not members of the Board of Education of a six-director school district are to be excused from jury service under Section 494.031(7), RSMo 1959, or whether board members are exempted from jury service by some provision of Senate Bill 3, of the 72nd General Assembly.

We have examined the provisions of Senate Bill 3, and find no section exempting members of Boards of Education from jury service.

Section 494.031, provides:

"The following persons shall, upon their timely application to the court, be excused from service as a juror, either grand or petit:

\* \* \* \* \*

"(7) Any officer or employee of the executive, legislative or judicial departments of the federal, state, county or city government who is actively engaged in the performance of his duties;"

Members of a Board of Education of a public school district obviously are neither officers or employees of federal, county or city governments. Although they occupy positions created and defined by the statutes of this state, they are not

Honorable A. Basey Vanlandingham

in a direct sense officers of the State of Missouri.

This office has previously distinguished between "officers or employees of the state" and "officers and employees under the state." Opinion 16, Proffer, February 25, 1966 (copy enclosed). In Opinion 16, we ruled that the phrase "under the state" as used in Article III, Section 12, of the Missouri Constitution, included employees of school districts; whereas the phrase "employees of the state" did not include employees of school districts.

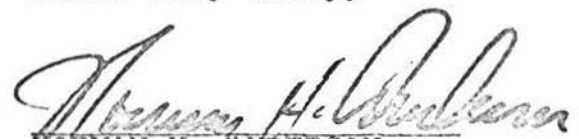
When the legislature has intended to include school districts with other classes of governments they have used such general phrases as "political subdivisions" (e.g., Section 70.310, RSMo Supp. 1965), or "municipality" (e.g., Opinion 16, supra). The provisions of Section 494.031(7), do not use any such general description.

#### CONCLUSION

Therefore it is the opinion of this office that members of the Board of Education of six-director school districts are not excused from jury service by the provisions of Section 494.031(7), RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my assistant Louis C. DeFeo, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

Enclosure: Opinion 16, Proffer,  
February 25, 1966.

STATE EMPLOYEES' RETIREMENT SYSTEM: A member of the legislature  
LEGISLATURE: who has served six or more  
RETIREMENT: years as a member of the General Assembly and who meets  
RESIGNATION: the conditions for retirement  
at or after normal retirement  
age is entitled to receive credit in calculating his retirement annuity for having served in a biennial assembly from which he has resigned.

OPINION NO. 133

May 18, 1967

Mr. Edwin M. Bode, Secretary  
State Employees' Retirement System  
State of Missouri  
P. O. Box 209  
Jefferson City, Missouri



Dear Mr. Bode:

This is in reply to your recent request for an official opinion from this office wherein you have stated in part as follows:

"What portion of a biennial assembly does a member of the Legislature have to serve in order to receive credit for that term for the purposes of retirement benefits under Section 104.390, RSMo Cum. Supp 1965?

"In the particular case under inquiry, the member has served three full terms in the General Assembly. He has now been elected to and has commenced to serve a fourth term.

"He is considering resigning from the General Assembly. If he does so prior to the end of the current biennial session, will he receive credit for having 'served in' this assembly for retirement purposes.?"

In determining the amount of retirement annuity for a member of the General Assembly, Section 104.390, Missouri Revised Statutes Cumulative Supplement 1965, states as follows:

Mr. Edwin M. Bode

" \* \* \* the minimum annuity of any member who has served six or more years as a member of the general assembly and who meets the conditions for retirement at or after normal retirement age shall consist of monthly payments made at the rate of twenty-five dollars multiplied by the number of biennial assemblies in which he has served; \* \* \* "

The primary rule in the construction of a statute is to ascertain the lawmaker's intent from the words used, if possible, and to put upon the language of the legislature, honestly and faithfully, its plain and rational meaning and promote its object. *Browder v. Milla*, 296 S.W.2d 502.

An analysis of the statute reveals that as a condition precedent to a member being eligible for retirement benefits, he must serve a definite and fixed period of time of six years in the General Assembly. However, after expressly stating this condition, no reference is made in the statute as to the length of time a member must serve in a particular biennial assembly in calculating his retirement benefits. It is our opinion that the silence of the legislature on this issue was "intentional".

Certainly a plain interpretation of the language in question; "number of biennial assemblies in which he has served," raises no inference that a member must serve the full period that a legislative assembly is in legal existence in order to qualify for having served in such assembly. The General Assembly is presumed to have intended what it has stated directly and unambiguously, and one may not, under the guise of construction, add to or take from the clear and definite terms of a statute. *State v. Pilkinton*, 310 S.W.2d 304.

In addition, a different conclusion would mean that an individual who was elected or appointed to fill a vacancy during the legal existence of a legislative assembly had not served as such in that biennial assembly for retirement purposes. We cannot believe that the legislature intended such an illogical result or one that is so contrary to the purpose of the statute. In ascertaining intention of the General Assembly, a court must give weight to the object sought to be accomplished, manifest purpose of act, and avoid if possible any construction which will lead to an absurd or unreasonable result. *State v. Tustin*, 322 S.W.2d 179.

Mr. Edwin M. Bode


Finally in construing a statute and arriving at intent thereof, it is proper and helpful to consider its historical background. *Kansas City v. Travelers Ins. Co.*, 284 S.W.2d 874. The legislative history of the statute in question reveals that it was amended in 1961 by the legislature with the condition of membership in the General Assembly being expressly changed from eight years to six years. It is presumed that the legislature acted with full knowledge and information as to the subject matter of the statute and that if it had desired to change or alter the phrase "number of biennial assemblies in which he has served", it would have done so. Where an amendment leaves certain portions of the original act unchanged, such portions are continued in force with the same meaning and effect. *State ex rel. Klein v. Hughes*, 173 S.W.2d 877, 351 Mo. 651.

#### CONCLUSION

A member of the legislature who has served six or more years as a member of the General Assembly and who meets the conditions for retirement at or after normal retirement age is entitled to receive credit in calculating his retirement annuity for having served in a biennial assembly from which he has resigned.

The foregoing opinion, which I hereby approve, was prepared by my Assistant B. J. Jones.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

VOTERS:  
METROPOLITAN PLANNING  
COMMISSION:  
DIVISION OF COMMERCE  
AND INDUSTRY:

Doctrine of "one-man, one-vote"  
does not apply to positions that  
are appointed.

March 23, 1967

OPINION NO. 136

Honorable William R. Royster  
Representative, 8th District  
House of Representatives  
Capitol Building  
Jefferson City, Missouri



Dear Representative Royster:

This opinion was prepared as a response to your inquiry whether the "one-man, one-vote" doctrine applies to the "Metropolitan Planning Commission-Kansas City Region", so that Kansas City would have to be proportionately represented (by population) on the governing board of said commission.

To arrive at a valid conclusion, we must first examine and understand the nature of the Metropolitan Planning Commission as constituted under the agreement made and entered into by the several parties to this instrument and the by-laws that were enacted to govern its operation. Primarily, we must determine the genesis of this commission, its powers, and its authority.

The "Metropolitan Planning Commission-Kansas City Region" is a mutual association of several political entities of two states (Missouri and Kansas) having a contractual conception and its appointive members or representatives operate within the framework spelled out by the contract of origin.



Representative Royster

The sole purpose of this organization is to develop regional plans for the industrial development of the total economic area party to this agreement. Under the terms of Article 3 of the Agreement, the members of the Commission are appointed. The legal authority for this action is found in Article VI, Section 16, Missouri Constitution and Section 70.220, 70.230, 70.250, 70.260, 70.270, 70.290 and 70.300 RSMo., 1959. The agreement does not contain nor the Commission purport to exercise any legislative authority as this term is commonly understood.

It is the opinion of this office that the so-called doctrine of "one-man, one-vote" is applicable only to elective offices. We have found no case law extending this doctrine of "one-man, one-vote" beyond the specific area involving elective offices. This holding is supported by the recent case of *Armentrout et al vs. Schooler* (Mo.-sup) \_\_\_\_\_ S.W. 2d \_\_\_\_\_ decided December 14, 1966 by the Missouri Supreme Court. We quote here extensively from this opinion as follows:

"It is judicially admitted and established by the answer of the city and its defending officials that there is a gross malapportionment of population in the division of the city into wards, from which it necessarily follows that there is a debasement or dilution of the weight of the votes of citizens living in three of the four wards.

"Beginning with *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed. 2d 663, and followed by *Gray v. Sanders*, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed. 2d 821; *Wesberry v. Sanders*, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed. 2d 481; *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed. 2d 506; *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 84 S.Ct. 1418, 12 L.Ed. 2d 568; *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 84 S.Ct. 1429, 12 L.Ed. 2d 595; *Davis v. Mann*, 377 U.S. 678, 84 S.Ct. 1441, 12 L.Ed. 2d 609; *Roman v. Sincock*, 377 U.S. 695, 84 S.Ct. 1449, 12 L.Ed. 2d 620; *Lucas v. Forty-Fourth General Assembly of State of Colorado*, 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed. 2d 632; *Hearne v. Smylie*, 378 U.S. 563, 84 S.Ct. 1917, 12 L.Ed. 2d 1036;

## Representative Royster

Pinney v. Butterworth, 378 U.S. 564, 84 S.Ct. 1918, 12 L.Ed. 2d 1037; and Hill v. Davis, 378 U.S. 565, 84 S.Ct. 1918, 12 L.Ed. 2d 1037, the Supreme Court of the United States has established these principles with respect to apportionment of representatives elected on a state level: Legislative reapportionment is a justiciable issue upon which an aggrieved citizen whose right to vote has been impaired may resort to the courts for relief.

"Statutes which provide for the selection of legislators upon the basis of unequal apportionment of the population in the respective legislative districts may be declared unconstitutional as in violation of the equal protection clause of the fourteenth amendment to the federal constitution. Seats in the legislative branch of state governments must be apportioned substantially on the basis of population; equal representation for equal numbers of people."

\* \* \* \* \*

"We have found no case in which the question has been passed on by the Supreme Court of the United States but lower federal courts and several state courts have sanctioned the penetration of this principle to levels of government subordinate to the level of state legislatures.

Bailey v. Jones, S.Dak. Sup., 139 N.W.2d 385 (board of county commissioners); State ex rel. Sonneborn v. Sylvester, 26 Wis. 2d 43, 132 N.W.2d 249 (county board of supervisors); Ellis v. Mayor and City Council of Baltimore, 4 Cir., 352 F.2d 123 (city council); Seaman v. Fedourich, 16 N.Y.2d 94, 262 N.Y.S. 2d 444, 209 N.E. 2d 778 (city council); Goldstein v. Rockefeller, 45 Misc. 2d 778, 257 N.Y.S. 2d 994 (county board of supervisors); Bianchi v. Griffing, 238 F. Supp. 997 (county board of supervisors);

## Representative Royster

Griffin v. Board of Supervisors of Monterey County (1963), 33 Cal. Rptr. 101, 384 P.2d 421; Henderson v. Superior Court of Marin County (1964), 37 Cal. Rptr. 438, 390 P.2d 206; Miller v. Board of Supervisors of Santa Clara County (1964), 37 Cal. Rptr. 440, 390 P.2d 208; State ex rel. Scott v. Masterson (1962), 173 Ohio St. 402, 183 N.E.2d 376 (city council). See Weinstein, The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government, 65 Columbia Law Review 21, 23-31; and notes in The George Washington Law Review, Vol. 33, No. 5, June 1965, p. 1132; University of Cincinnati Law Review, Vol. 34, No. 3, Summer 1965, p. 397.

"Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, among other things, that 'No State shall make or enforce any law which shall \* \* \* deny to any person within its jurisdiction the equal protection of the laws.'

"The following provisions are from the Constitution of Missouri, 1945: Art. I, § I, provides 'That all political power is vested in and derived from the people; that all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole'; Art. I, § 2: '\* \* \*that all persons are created equal and are entitled to equal rights and opportunity under the law;\* \* \*' and Art. I, § 25; 'That all elections shall be free and open<sup>2</sup>; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.'

"The city council in a city of the third class, elected by the people to represent the inhabitants, is primarily a legislative body exercising general governmental functions."

\* \* \* \*

Representative Royster

"The Fourteenth Amendment to the Constitution of the United States applies to the State of Missouri and to every governmental creature of the state to which it has delegated powers of government. A city of the third class is a creature of the state and its legislative body, the city council, exercises the legislative powers delegated to it by the General Assembly. The State of Missouri may exercise its legislative powers only through a legislative body apportioned on a population basis, and it logically follows that the agency, arm or instrumentality to which the state delegates some of its powers should be governed by the same principle. *Seaman v. Fedourich*, supra, 209 N.E.2d, l.c. 782 [4]; *Brouwer v. Bronkema*, No. 1855, Cir. Ct. Kent County, Michigan, September 11, 1964.

"Since the members of the City Council of the City of Louisiana are elected by the people in a representative capacity, and perform primarily legislative functions importantly affecting the people, the wards from which they are elected must be substantially equal in population, under the equal protection of the laws clauses of the constitutions of the United States and of the State of Missouri."

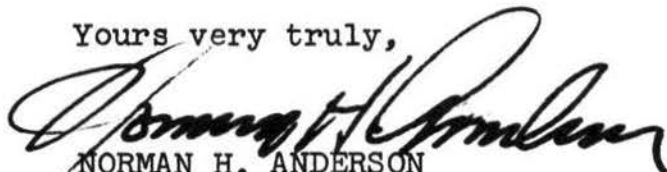
As we have stated above, we find the "Metropolitan Planning Commission-Kansas City Region" and the articles of its organization does not purport to elect any of its members, therefore, the doctrine of "one-man, one-vote" would not apply.

#### CONCLUSION

It is the opinion of this office that the "one-man, one-vote" doctrine does not apply to the "Metropolitan Planning Commission-Kansas City Region" inasmuch as its organization articles provide for the appointment of the members of the Commission.

The foregoing opinion which I hereby approve was prepared by my Assistant, Richard C. Ashby.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

COUNTY SCHOOL SUPERINTENDENT: County voter registration under  
VOTER REGISTRATION: Chapter 114, RSMo, does not apply  
SCHOOL DISTRICTS: to voters living outside Springfield  
voting for county superintendent  
of schools or the school election.

February 21, 1967

OPINION NO. 139

Honorable Jack Yocom  
Prosecuting Attorney  
Greene County  
Springfield, Missouri 65802



Dear Mr. Yocom:

On January 19, 1967, you submitted an opinion request as follows:

"On April 4, 1967, the annual school election is to be held for the County Superintendent of Schools in Greene County in accordance with Chapter 179 of RSMo. At the same time the County Superintendent of Schools is elected, we also ballot at the annual school election for directors and levy.

"In September, 1963, county-wide registration was adopted in accordance with Chapter 114 of RSMo.

"I would appreciate the opinion of your office as to whether or not our county-wide registration applies to people outside the city limits of Springfield, Missouri, as a necessary qualification for voting in the up-coming school election for superintendent and regular school election, especially in view of Chapter 179.020 RSMo, Sub-Section (3), and in view of Chapter 162.361, RSMo, Sub-Section (4)."

Honorable Jack Yocom

In substance your question is whether Chapter 114, RSMo, applies to voters living outside the city limits of Springfield in the annual school election and in the election held on the same date for county superintendent of schools of Greene County. Chapter 114, RSMo, applies only to areas in Greene County outside the corporate limits of Springfield.

In your letter you call attention to Section 162.361, RSMo Cum. Supp. 1965. This section states that voter registration laws applicable to general elections in cities and counties having certain populations applies to elections in six-director school district elections. Greene County does not come within the classification of counties mentioned therein so this section has no application to this question.

If Chapter 114, RSMo, is to be applied to a district school election or to the election of the county superintendent of schools in Greene County, it would be under the provisions of said chapter.

Section 114.240, RSMo Cum. Supp., provides:

"This chapter shall not be construed to include elections other than state and county general, special and primary elections and municipal elections of all kinds in cities having more than four hundred thousand inhabitants."

It is apparent that this section applies only to state and county general, special and primary elections and municipal elections in cities having more than 400,000 inhabitants. It does not apply to a school district election because such an election is not a state or county election. Such an election is simply a school election, regardless of the size of the area or territory in the school district. A district school election or an election for county superintendent of schools is not a primary election to nominate candidates for office so they do not come within this provision of the statute. The question then arises whether the election of county superintendent of schools is a "county general" or "special" election under the above statute. The election of county superintendent of schools is not a special election because it is to be held on a date set by statute. The question remaining is whether the election of a county superintendent of schools comes within the term "county general" election as that term is used in the statute.

The primary rule of constructions of statute is to ascertain and give effect to the intent of the legislature. Casten v. Guth, 375 S.W.2d 110.



Honorable Jack Yocom

Section 1.020, RSMo, provides that as used in the statutes unless otherwise specifically provided or unless plainly repugnant to the intent of the legislature "general election" means the election required to be held on the Tuesday succeeding the first Monday of November, biennially.


It is our opinion that the provisions of Chapter 114, RSMo, concerning voter registrations do not apply to the district school elections or to the election of the county superintendent of schools for Greene County. These elections do not come within the provision of Section 114.240, supra, unless they can be classified as a "county general" election. Certainly the school district election does not come within this term because it is not a county election. The election of a county superintendent of schools is a county-wide election. However, it is our opinion that the legislature by using the term "county general" election intended Chapter 114, RSMo, to apply only to the November election when county officials are elected and at which time other issues may be submitted to all the voters of the county. Undoubtedly, the legislature by using the term county "general" election meant to limit the election to the regular November election and that it should not include an election held for county superintendent of schools which under statute must be held in April.

#### CONCLUSION

It is the opinion of this office that voter registration under Chapter 114, RSMo, does not apply to voters living outside the city limits of Springfield voting in the regular six-director school elections or to the election for county superintendent of schools in Greene County.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, **Moody Mansur**.

Very truly yours

  
NORMAN H. ANDERSON  
Attorney General

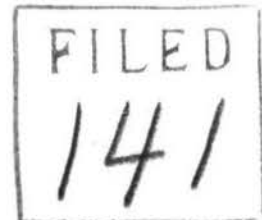
CITY LIBRARY :  
COUNTY LIBRARY:  
LIBRARIES:  
CO-OPERATIVE AGREEMENTS:

(1) The Mexico City Library and the Audrain County Library District are authorized to expend funds to remodel a building for the use of both (2) That the building may be owned by the two as tenants in common and (3) That the two may enter into a cooperative agreement respecting the rights and obligations of both.

OPINION NO. 141

June 16, 1967

Mr. Charles O'Halloran  
State Librarian  
Missouri State Library  
State Office Building  
Jefferson City, Missouri 65101



Dear Mr. O'Halloran:

This office is in receipt of your request for a legal opinion based upon facts outlined in your letter and reading as follows:

"The Mexico Public Library and the Audrain County Library are associated together under contract and under the terms of this contract provide a library program for both city and county, although both libraries are legally independent. Recently title to the Mexico Post Office was acquired by the City library district and it is proposed that this building be remodeled into a library to be used by both districts. It is proposed further that funds possessed by the two library districts be used for remodeling purposes. Title to the building would remain in the Mexico Library District. The Missouri State Library administers a federal program for public library construction and the federal law requires that the funds be expended in accordance with state law. This agency has received a request for federal funds for the Mexico-Audrain County Project.

1. May funds derived from two public sources (city and county library districts) be used to remodel a building belonging to one of the districts?

Mr. Charles O'Halloran

2. Can this agency legally allocate funds to a project in which local funds are being mixed in this fashion?
3. Is there any way whereby the two districts may remain legally independent and still use funds from both sources to remodel this building, and if so, under what circumstances may this agency allocate funds to the project?"

We have subsequently been advised by the Chairman of the County Library District that it is intended that the building will be owned by the City Library and the County Library as tenants in common and that they have or will enter into a cooperative agreement that will fully spell out the rights of both during its operations and upon its termination.

Section 182.070, RSMo 1959, gives the general powers of a county library district and reads as follows:

"The county library district, as a body corporate, by and through the county library board of trustees, may sue and be sued, complain and defend, and make and use a common seal, purchase, or lease grounds, purchase, lease, occupy or erect an appropriate building for the use of the county library and branches thereof out of current funds if such funds are available above those necessary for normal operations or, as provided in section 182.105, and sell and convey real estate and personal property for and on behalf of the county library and branches thereof, receive gifts of real and personal property for the use and benefit of the county library and branch libraries thereof, the same when accepted to be held and controlled by the board of trustees, according to the terms of the deed, gift, devise, or bequest of such property."

Section 182.080, RSMo 1959, provides the Board of Trustees of a county library district may contract with the body having control of any other public library (1) for assistance in operation of the county library, and (2) provide library service

Mr. Charles O'Halloran

of the county library district. Said section reads as follows:

"The county library board of trustees may contract with the body having control of a public library for assistance in the operation of a free county library under such terms and conditions as may be stated in the contract, or it may contract with the body having control of a public or a school library or any other library to furnish library service to the people of the county library district, under such terms and conditions as may be stated in the contract. The body having control of any library district may contract with any such county library board of trustees to provide library service to the people of the library district under such terms and conditions as may be stated in the contract. The county library board of trustees may contract with any other county library district under the terms outlined in sections 70.210 to 70.320 RSMo. In case a contract is made for services by any library, the contracting library boards of trustees shall advise and consult together with regard to the management and disbursement of funds, and other policies relating to the proper management of the library."

Among the general powers of a city library, to be exercised through its board of directors, are those stated in Section 182.200 RSMo 1959(4) and reading as follows:

"(4) They shall have the exclusive control of the expenditure of all moneys collected to the credit of the library fund, and of the construction of any library building, and of the supervision, care and custody of the grounds, rooms or buildings constructed, leased, or set apart for that purpose. All moneys received for the library shall be deposited in the city treasury to the credit of the city library fund, and shall be kept separate and apart from other moneys of the city, and drawn upon by the proper officers of the city, upon the properly authenticated warrants of the library board."

\* \* \* \* \*

Mr. Charles O'Halloran

"(6) The board may extend the privileges and use of the library to nonresidents through agreements with other existing libraries allowing for exchanges of services, upon such terms and conditions as the boards of the libraries, from time to time, may prescribe."

Pursuant to the authority of Article VI, Section 16, of the Constitution, the Legislature has also enacted statutes providing for cooperation between political subdivisions. Section 70.220, RSMo 1959, provides:

"Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions, or with any private person, firm, association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. If such contract or cooperative action shall be entered into between a municipality or political subdivision and an elective or appointive official of another municipality or political subdivision, said contract or cooperative action must be approved by the governing body of the unit of government in which such elective or appointive official resides."

Also relevant to this inquiry is Section 70.240, RSMo 1959:

"The parties to such contract or cooperative action or any of them, may acquire, by gift or purchase, or by the power of eminent domain exercised by one or more of the parties thereto in the same manner as now or hereafter provided for corporations created under the law of this state for public use, chapter



Mr. Charles O'Halloran

523, RSMo, and amendments thereto, the lands necessary or useful for the joint use of the parties for the purposes provided in section 70.220, either within or without the corporate or territorial limits of one or more of the contracting parties, and shall have the power to hold or acquire said lands as tenants in common."

From the factual situation outlined in the opinion request, the Mexico (city) Library and the Audrain County Library have entered into a contract for the purpose of providing library services to the people of each. The library building owned by the city library, is to be used by patrons of both. It is proposed that funds of both be used to remodel the city library building which has given rise to the first inquiry of the opinion request.

Among the general powers of a county library district, to be administered by and through its board of trustees as provided by Section 182.070, supra, the board may "purchase, or lease grounds, purchase, lease, occupy or erect an appropriate building for the use of the county library and branches thereof out of current funds in such funds are available above the necessary or normal operations, or as provided in Section 182.105." Section 182.105, in part reads:

"(1) The county library board in any county library district may provide for the purchase of ground and for the erection of public library buildings, and for the improvement of existing buildings, and may provide for the payment of the same by the issue of bonds or otherwise, subject to the conditions and limitations set forth in this section."

Under Section 182.070 a County Library District has power to "purchase or lease grounds, purchase, lease, occupy or erect an appropriate building for the use of the county library." This undoubtedly includes the power to acquire a building already in existence and to remodel it for library use. Section 182.200 authorizes city libraries to construct "any library building" and to supervise, care for, and maintain custody of the grounds, rooms and buildings, constructed, leased, or set apart for that purpose. This would appear also to authorize a city library district to acquire a building and remodel the same for library



Mr. Charles O'Halloran

use. Admittedly, however, the language is not clearly designed to fit the exact project and proposal here contemplated.

The Legislature, however, in implementing the provisions of Section 16, Article VI of the Constitution, enacted Section 70.220, RSMo 1959, which authorizes any municipality or political subdivision "for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; \* \* \*". This broad language would appear to supply any possible deficiency with respect to the cooperation between the county library district and the city library that may be found lacking in the other statutes referred to. Section 70.240 expressly authorizes political subdivisions to acquire by gift or by purchase lands necessary or useful for the joint use of the parties for the purposes provided in Section 70.220 and this statute further expressly provides that the contracting parties shall have the power to hold or acquire said lands as tenants in common. All of these statutes taken and considered together would appear to authorize the city library and the county district here affected to acquire the building and jointly enter into a cooperative agreement to remodel the building for their joint use.

There is one other factor to consider. That is whether the city library and the county library district here involved are political subdivisions within the meaning of Sections 70.220 and 70.240. The definition of political subdivision was amended in 1963 so that Section 70.210, definition of terms, now provides:

"(2) 'Political subdivisions', counties, townships, cities, towns, villages, school, county library, city library, city-county library, road, drainage, sewer, levee and fire districts, and any board of control of an art museum."

It thus will be noted that the definition of political subdivision in the amended statute was so broadened as to include both county library districts and city library. It is thus clear that the two entities involved in the proposed contractual relationship here are expressly made political subdivisions as those terms are used in Sections 70.220 and 70.240.

Mr. Charles O'Halloran

CONCLUSION

It is the opinion of this office that the Mexico City Library and the Audrain County Library District are authorized to expend funds to remodel a building for the use of both; (2) that the building may be owned by the two as tenants in common; and (3) that the two may enter into a cooperative agreement respecting the rights and obligations of both.

The foregoing opinion, which I hereby approve, was prepared by my Assistant J. Gordon Siddens.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Norman H. Anderson", with a long, sweeping horizontal line extending to the right.

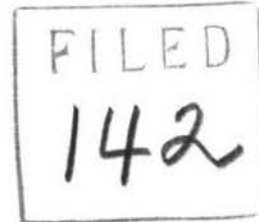
NORMAN H. ANDERSON  
Attorney General

MAGISTRATES: Pursuant to Section 483.485, RSMo Cum. Supp.  
MAGISTRATE COURTS: 1965, a county court determines the need for  
EMPLOYEES: additional employees of a magistrate court and  
COMPENSATION: also determines the amount of salary to be paid  
COUNTIES: from the county funds.  
COUNTY COURTS:

OPINION NO. 142

February 21, 1967

Honorable Peter H. Rea  
Prosecuting Attorney  
Taney County  
Forsyth, Missouri



Dear Mr. Rea:

This is in response to your request for an opinion from this office, which request states the following:

"Taney County Magistrate Court Judge J. C. Crouch for the coming year by order of his Court, ordered, pursuant to the above section that additional help was required and needed in his office, and he appointed same and set their pay. The total pay allowed the Magistrate for help from the State of Missouri under 483.490 is \$3,000.00, which sum has always been used in full. The new appointments and the new pay scale places the matter now to the position that the County must pay, if anyone is paid under that part of 483.485 which reads as follows:

---'Provided, that in any County where need exists, the County Court is hereby authorized, at the costs of the County, to provide such additional clerks or other employees as may be required and to provide funds for the payment of salaries or parts of salaries of clerks, deputy clerks and other employees in addition to the amounts payable by the State under this section.

The County Court of Taney County, in preparing the budget for 1967 is faced with the new salaries and employees appointed by the Magistrate Judge. The

Honorable Peter H. Rea

Court recognizes that they cannot and do not attempt to have anything to do with the part paid by the State. My question is, however, under this section, Does the County Court of Taney County have discretion to pay or not to pay said additional sums; also, who makes the finding of whether there is need, and if the Magistrate Court makes such a finding, is the County Court bound by it."

It should be noted that Taney County, according to the 1960 census, has a population of 10,238 and an assessed valuation of \$18,187,413.00. You informed this office by phone that the Taney County Magistrate Court is the only magistrate court in the county.

I first direct your attention to Section 483.485, RSMo Cum. Supp. 1965, which states in part:

"In all counties each magistrate shall by an order duly made and entered of record appoint and fix the salary of a clerk of his court and may appoint such deputies and employees as may be necessary for the proper dispatch of the business of his court and fix their salaries at such sum as in his discretion may seem proper. The total salaries of clerk, deputies and other employees paid by the state shall in no event exceed the annual amount fixed in section 483.-490 for clerk and deputy clerk hire of such courts; provided, that in any county where need exists, the county court is hereby authorized, at the cost of the county, to provide such additional clerks, deputy clerks or other employees as may be required and to provide funds for the payment of salaries or parts of salaries of clerks, deputy clerks and other employees, in addition to the amounts payable by the state under section 483.490. . . "

Section 483.490, supra, states in part:

"1. Salaries of clerks, deputy clerks and employees provided for in section 483.485 shall be paid by the state within the limits herein provided upon requisition filed by the judges of the magistrate courts; except that the salaries of clerks, deputy clerks and employees of additional

Honorable Peter H. Rea

magistrates whose offices are created by order of the circuit court as provided in section 482.010, RSMo, shall be paid by the county as the salaries of such magistrates are required to be paid. The total amount that may be paid by the state in any one year for such clerks, deputy clerks and employees of the magistrate courts in the different counties shall not exceed the following sums: . . . "

Subsection (3) of Section 483.490, supra, is applicable to Taney County because of the assessed population and valuation noted previously. Subsection (3) states:

"(3) In all counties now or hereafter having a population of ten thousand seven hundred and fifty inhabitants or less, with an assessed valuation of over eleven million dollars, the sum of three thousand dollars;. . . "

Paragraph 2 of Section 483.490 states:

"2. The salaries of such clerks, deputy clerks and employees shall be fixed by the magistrate, or magistrate court if the magistrates are organized into a court with divisions. When the judge of the probate court is also judge of the magistrate court, such judge, in his discretion, may designate one or more of such clerks, deputy clerks, or employees as clerks, deputies or employees in the probate court."

The exception clause in paragraph 1 of Section 483.490, supra, would not apply here as the magistrate court in question is not an "additional magistrate court" created by authority of Section 482.010, RSMo.

There is no prohibition against the county paying a duly appointed deputy clerk or employee of a magistrate court a salary in addition to the salary received by deputy clerks or employees paid by the State. As noted in an opinion to Mr. Raymond Vogel, 1950, No. 92, enclosed herewith, the authority for such additional compensation is derived from the language found in Section 483.485, supra, stating that the county is authorized to provide additional employees and salaries ". . . in addition to the amount payable by the state. . . "

The language found in Section 483.485 has been construed in State ex rel. Hart vs. City of St. Louis, 204 S.W. 2d 234, 238, as follows:

Honorable Peter H. Rea

"\* \* \* provided, that in any county where need exists, the county court is hereby authorized, at the cost of the county, to provide such additional clerks, deputy clerks or other employees as may be required.' There can be no doubt that the Board of Aldermen, acting in its capacity as a county court, had the right to determine the need for additional clerks, deputy clerks and other employees at the expense of the city. . . "

It would therefore appear that if county funds are to be used for salaries in compliance with the statutes cited, the county court has the authority to determine if the magistrate court is in need of additional employees. It would follow that the amount of salary, if any, to be paid over and above the amount provided by the State would be left to the discretion of the county court.


The questions you asked, therefore, are answered by the language found in *State ex rel. Hart v. City of St. Louis*, supra, and therefore it is the opinion of this office that the county court decides if there is a need for additional employees to assist the magistrate and further determines the amount to be paid for salaries from county funds.

#### CONCLUSION

Pursuant to Section 483.485, RSMo Cum. Supp. 1965, a county court determines the need for additional employees of a magistrate court and also determines the amount of salary to be paid from the county funds.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Gerald L. Birnbaum.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

Enc: Op. No. 92, 1950, Vogel



Opinion No. 143  
Answered by Letter (Siddens)

July 20, 1967



Honorable Bill D. Burlison  
Prosecuting Attorney  
Cape Girardeau County  
Cape Girardeau, Missouri

Dear Mr. Burlison:

This is in response to your opinion request dated January 23, 1967, seeking clarification of our opinion to you, No. 127 dated March 21, 1966, and a clarification of the meaning of Section 55.050, RSMo 1959.

Section 55.050 relating to vacancies in the office of County Auditor provides:

"At the general election in the year 1946, and every four years thereafter, a county auditor shall be elected in each county of the second class. He shall be commissioned by the governor and shall enter upon the discharge of his duties on the first Monday in January next ensuing his election. He shall hold his office for the term of four years and until his successor is duly elected and qualified, unless he is sooner removed from office. If a vacancy occurs in the office by death, resignation, removal, refusal to act, or otherwise, the governor shall fill the vacancy by appointing some eligible person to the office, who shall discharge the duties thereof until the next general election, at which time an auditor shall be chosen for the remainder of the term, who shall hold his office until his successor is duly elected and qualified, unless sooner removed."

XERO COPY XERO COPY XERO COPY XERO COPY

Honorable Bill D. Burlison

The last sentence of Paragraph 3, Page 1, of the Burlison opinion which refers to and purports to construe the Dames opinion reads as follows:

"This opinion further holds that on or after that date the Governor may appoint an auditor to fill such vacancy to serve until the end of the term."

This language is unjustified by any other language in the Dames opinion, not in accord with the conclusion of that opinion, and is clearly contrary to the language of the statute. The language of the statute makes it clear that the Auditor shall serve "until the next general election at which time an auditor shall be chosen for the remainder of the term". That language of the statute is clear, explicit and unambiguous. It means that the County Auditor appointed by the Governor on or about January 1, 1967, should serve until the next general election in 1968 at which time a County Auditor will be elected to fill the remainder of the unexpired term.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

Opinion No. 146  
Answered by Letter (Gardner)

August 1, 1967



Honorable Jewell Kennedy  
State Representative, 17th District  
6111 Harris  
Raytown, Missouri

Dear Representative Kennedy:

Since writing to you on May 23, 1967, we have given consideration to questions raised in your letter of January 24, 1967, with respect to Bill No. 105, Ordinance No. 104, Section III, entitled Ordinance Establishing the Ward Boundaries of the City of Raytown, Missouri. A pertinent part of said ordinance states:

"That there hereby be established new ward boundaries in the City of Raytown, Missouri, effective April 2, 1968."

The questions raised in your letter are:

"If ward lines are redrawn in a city of the fourth class during the terms of incumbent aldermen, are the aldermen entitled to complete the two-year term of office for which they have been elected?

"If your opinion on the first issue allows the aldermen to complete the term for which they were elected, is this result affected by the fact that the new ward lines place more than two aldermen in the same ward until the next election?"

The tenure of aldermen is governed by express statutory authority. Section 79.060, RSMo 1959:

Honorable Jewell Kennedy

"The board of aldermen shall, by ordinance, divide the city into not less than two wards, and two aldermen shall be elected from each ward by the qualified voters thereof, at the first election for aldermen in cities adopting the provisions of this chapter. At such election for aldermen the person receiving the highest number of votes in each ward shall hold his office for two years, and the person receiving the next highest number of votes shall hold his office for one year; but thereafter each ward shall elect annually one alderman, who shall hold his office for two years."

It is apparent from this statute that the incumbent aldermen are entitled to complete the two-year term of office to which they have been elected if they meet the qualifications for aldermen during that period. Qualifications for aldermen are set forth in Section 79.070, as follows:

"No person shall be an alderman unless he be at least twenty-one years of age, a citizen of the United States, and an inhabitant and resident of the city for one year next preceding his election, and a resident of the ward from which he is elected. Whenever there shall be a tie in the election of aldermen, the matter shall be determined by the board of aldermen."

From this statutory requirement it appears that in the event an alderman who was elected from one of the present wards was to voluntarily change his residence to another ward of the city in which another alderman resides, then the former would become disqualified to represent the ward from which he was chosen and forfeits his right to the office. State ex rel Johnston v. Donworth, 127 MoApp. 377, 105 S.W. 1055. However a different situation is presented in your letter than that to which the section refers. From your letter we understand that a legally qualified alderman at the time of his election has not changed his residence, but through no fault of his own, his residence is now located in the same ward as that of another alderman because the ward lines have been withdrawn. The qualification

Honorable Jewell Kennedy

provisions of the statute are very limited and do not cover situations of this kind unless it is the legislative intent that the expressed qualifications of aldermen are to be extended by implication to include the circumstances referred to in your letter.

In determining the intent of the legislature we find that the general rule as to how statutory qualifications of public officers are to be construed is given in C.J.S., Vol. 67, p. 126, § 11, Officers, as follows:

"Provisions in statutes and constitutions imposing qualifications should receive a liberal construction in favor of the right of the people to exercise freedom of choice in the selection of officers, and in favor of those seeking to hold office; and ambiguities should be resolved in favor of eligibility to office. It does not follow, however, that the courts should give words an unreasonable construction in order to uphold the right of one to hold office. Disqualifications provided by the legislature are construed strictly and will not be extended to cases not clearly within their scope, although it has been held that a statute making an officer ineligible for the same or a similar position for a specified time in case of his removal from office for specified causes should be liberally construed to effectuate its object.  
\* \* \*

This rule has been approved in Missouri. State ex rel Mitchell v. Heath, 345 Mo. 226.

In accordance with this general rule, Section 79.070 must be strictly construed. If the lawmakers intended to include a provision which would disqualify an alderman when the ward lines are withdrawn as indicated in your letter, they surely would have done so. In the absence of such a statutory provision, Section 79.070 cannot by implication be construed to disqualify a duly elected alderman who did not move his residence but whose ward lines were changed around him.

Honorable Jewell Kennedy

Therefore, the present aldermen may continue in office for the remainder of their terms.

This result is not affected by the fact that the new ward lines place more than two aldermen in the same ward until the next election. Section 79.030 provides for a general election for the elective officers of each city of the fourth class to be held on the first Tuesday in April next after the organization of such city, then every two years thereafter. The next election in Raytown will be on April 2, 1968. Since the ordinance becomes effective on election day, it appears that one alderman may be elected from each of the new wards on that day and the terms of the incumbent aldermen will expire one year thereafter. Inasmuch as they have not changed their residence, the incumbent aldermen are in a position to represent the people who elected them, notwithstanding the fact that as an incident of the organization of the city they, along with the people who elected them, are placed in new wards.

This office has held in opinions issued under date of May 23, 1966, to Bill D. Burlison (#137 - 1966) and February 19, 1960, to Roy W. McGhee, Jr., that changes in school district, township or county lines do not result in loss of office of members of the county boards of education who are required to reside in the district from which they were elected, when such changes place the residence of the members of the board of education in other districts. We are enclosing copies of such opinions.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

Enclosures: Opinions to  
Bill D. Burlison, 5-23-66 (#137);  
Roy W. McGhee, Jr., 2-19-60.



**CONFLICT OF INTEREST:  
AGRICULTURE:  
JOHNSON GRASS LAW:  
COUNTY WEED CONTROL BOARD:**

The employment by the Platte County Weed Control Board of one of its members to perform services for the Board is against public policy and therefore unlawful.

March 14, 1967

**OPINION NO. 149  
Answered by letter-Downey**

Mr. J. P. Argenbright  
Assistant Commissioner  
Department of Agriculture  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. Argenbright:

Reference is made to your request for an official opinion from this office as follows:

"One of the members of the Platte County Weed Control Board wishes to do some work for the board. Under the Johnson Grass Law members serve on the board without remuneration and are paid for actual expenses only.

"Would it be legal for the board to employ one of its members to perform actual services for the board."

The Johnson Grass Control Law is found in Sections 263.255 through 263.267 (all references herein are to the Revised Statutes of Missouri, 1959). The County Weed Control Board is appointed by the Commissioner of Agriculture pursuant to Section 263.257 (2). Taxes to provide revenues to pay the expenses of the County Weed Control Board are provided by Section 263.265. The duties of the County Weed Control Board are to inspect or cause to be inspected annually all lands within the county, to advise and assist in the administration of the Johnson Grass Control Law and to perform such other duties as prescribed by the Commissioner of Agriculture (263.257 and 263.259). Duties for the Weed Control Board have been prescribed by the Commissioner of Agriculture and include the following rule and regulation:

Mr. J. P. Argenbright

"II. 2. Select such personnel as deemed necessary to expedite the County Weed Control Program."

It appears that the selection of employees, the determination of their duties, setting the amount of compensation for employment, and the direction and supervision of duties performed are subject entirely to the judgment and discretion of the County Weed Control Board.

This office rendered its official Opinion No. 465 on December 29, 1966, to Mr. Lee E. Norbury, Assistant Executive Secretary, Missouri State Soil and Water Districts Commission, which discusses the legal principles applicable to the question which you have raised. A copy of the opinion is enclosed. The opinion concludes that the employment of an individual by a public body of which he is a member is void as against public policy.

It is the opinion of this office that the employment by the Platte County Weed Control Board of one of its members to perform services for the Board is against public policy and therefore unlawful.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

TJD:db

Enclosure: Opinion No. 465

March 20, 1967



OPINION NO. 150  
Answered by Letter, Ashby

Honorable Albert F. Turner  
Attorney at Law  
William Grove National Bank Building  
Mountain Grove, Missouri

Dear Mr. Turner:

This letter answers your inquiry concerning the authority of a township in maintaining public roads to go upon that property located between the ditch line of the road and the fence line of private property adjacent to such strip of land for purposes of weed control, etc.

You state in your letter that often there is no deed of record to the county to this strip of land lying between the road ditch and the fence marking the boundaries of the private land. You also state that this strip of land between the roadway ditch and the fence of the private land owners has been used by the public for quite a number of years. We assume for the purpose of the question here that the public use of this strip of land has been in excess of ten (10) years.

In Opinion 353, dated March 24, 1965, to the Honorable James Paul (which we attach), we considered a similar question where the roadway involved had been established by prescription and therefore the exact width of the road was not known. We held the road was the "used portion of the highway" and was not limited to the narrow

Honorable Albert F. Turner

travel tracks but to the full extent of any use by the public (as a question of fact) which the public may have exercised such as ditching and public maintenance of the side of the road (State v. Auffart, 180 S.W. 571, 572). We also pointed out in this opinion that it was possible for the owner of land contiguous to the road to dedicate additional land space for such use either by additional dedication in fact or by an implied dedication commonly referred to as an estoppel in pais (McIntosh v. Haworth, 124 S.W. 2d 653, 656).

Certainly, if the land between the road ditch and the fence line was in fact public property, we believe there would be no question but that the township could properly maintain this strip.

We would conclude therefore that if the land lying between the road ditch and the fence line of the adjacent privately owned land is either public land in fact or has been dedicated to public use (for such a period in excess of ten (10) years) under Section 516.010 RSMo., 1959, that the township could properly enter upon and maintain the condition of the land lying between the road proper and the fence line of adjacent privately owned land.

In the last paragraph of your letter, you ask us for our "ideas as to the rights of the township and their liability, if any" in taking care of these land strips lying between the ditch line and the fence line of public roads. Without a specific problem accompanied by facts, we are unable to prepare a reply in detail inasmuch as any answer would necessarily depend on the substitution of conjecture for facts.

We do invite your attention to the case of Swineford v. Franklin County, 6 Mo. App. 39, 41 (affirmed in 73 Mo. 279) where the issue of county liability is discussed.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

ABSENTEE BALLOTS: Applications made by mail for absentee ballots  
REGISTRATION: may be made signed either by the person's signature or his mark if properly authenticated.  
ELECTIONS: If not authenticated, the Board of Election Commissioners should investigate to determine the validity of the application. If the application is made in person, by the voter, it may be executed, either by the voter's signature or his mark.

OPINION NO. 151

October 24, 1967

Mr. Fred A. Murdock, Chairman  
Board of Election Commissioners  
1331 Locust Street  
Kansas City, Missouri 64106



Dear Mr. Murdock:

This opinion responds to your recent letter requesting an opinion of this office on two questions which you submit as follows:

"1. Is an application for an absentee ballot received by mail and 'signed' by mark valid and, if so, what adequate safeguards can the Board lawfully establish to prevent fraud through the use of such applications?

"2. Is an application for an absentee ballot made in person by the voter and 'signed' by mark valid?"

We note there that the above questions are limited to the application for an absentee ballot. Our opinion will therefore be limited to the "application for an absentee ballot."

Section 1.020(17), RSMo 1959, on the construction of statutes reads as follows:

"(17) 'Written' and 'in writing' and 'writing word for word' includes printing, lithographing, or other mode of representing words and letters, but in all cases where the signature of any person is required, the proper handwriting of the person or his mark, is intended;"

Mr. Fred A. Murdock

Your first question on the application for an absentee ballot received through the mail and "signed" by a mark is answered in the affirmative within certain limitations which we will discuss later. We hold such an application to be valid if the request complies with the other requirements of the statute. We refer to Section 112.030, RSMo Supp. 1965, which reads as follows:

"Application for such ballot may be made on a blank signed by the applicant, to be furnished by the county clerk of the board of election commissioners or other officer or officers charged with the duty of furnishing ballots as aforesaid, or may be made in writing by first class mail addressed to such officer or board signed by the said applicant."

It is "a well settled rule of law that any mark intended as a signature acts as such." (City of Maplewood v. Johnson, 273 S.W. 237, 239).

We note parenthetically that we have previously ruled in Opinion No. 500 dated November 3, 1966, addressed to you, that the requirements of Chapter 112, RSMo as amended on absentee balloting, are mandatory.

The courts of this state hold generally that "Election laws must be liberally construed in aid of the right of suffrage" (Nance v. Kearbey, 158 S.W. 629, 1.c. 631). This statement was quoted with approval by the Supreme Court in an en banc decision of Application of Lawrence, 185 S.W.2d 818, 1.c. 820 and State v. Holman, 349 S.W.2d 945, 1.c. 947.

In the case of State v. Brown, 33 S.W.2d 104, the Missouri Supreme Court En Banc, on a statute concerning an absentee registration, said at 1.c. 107:

" \* \* \* Now every person having the qualifications prescribed by the constitution has the right to vote, and the sole objectives of the statute is to determine the individuals who possess those qualifications and make a public record thereof \* \* \*".



Mr. Fred A. Murdock

Certainly, the courts have adopted a liberal interpretation in deciding the law on issues extending to those questions involving eligibility of voters, yet demanding strict compliance as to procedure.

These statutes on election laws cover several chapters governing election procedures. These statutes are closely related and are considered to be in pari materia. Therefore, they are to be read and construed together with effect given to all provisions of these chapters. Inasmuch as we do hold them in pari materia, we assume the position that the words "signed" or "signature" are to be applied and used as defined in Section 1.020(17), supra. Thus, where the signature of any person is required, the proper handwriting of the person or his mark is intended.

Accordingly, we conclude that the safeguards you inquire about are those dictated by the requirement to establish the identity of the voter. Thus, if the X-mark on the application is authenticated in some fashion as by a notary public or by signatures of witnesses whose authenticity as witnesses can be established from your records or otherwise, the application containing the X-mark of the voter should be accepted. If the X-mark is not authenticated (in some acceptable fashion), the Board has a duty to ascertain to their satisfaction, as by a personal interview, the validity of such X-mark, before an application for an absentee ballot is mailed.

Your second question is answered in the affirmative. An application made in person signed by the signature or "mark" of the applicant is valid for the reasons we discussed above. We note that the identity of the applicant for an absentee ballot should be established through comparisons of the applicant with registration records that are maintained in your office. Thus, you can establish that the applicant is the person whom he purports to be.

#### CONCLUSION

It is the opinion of this office that:

(1) That an application for an absentee ballot received by mail may either be executed under the signature of the applicant or his mark. In the latter case, the mark must be authenticated in some acceptable fashion. If the mark is not authenticated, the Board must ascertain to their satisfaction that the voter did, in fact, make the application for an absentee


Mr. Fred A. Murdock

ballot before the absentee ballot is dispatched.

(2) An application for absentee ballot made in person by the voter may be executed by the signature of the applicant or by his mark.

The foregoing opinion which I hereby approve was prepared by my assistant Richard C. Ashby.

Yours very truly,



NORMAN H. ANDERSON  
Attorney General

COUNTY HIGHWAY ENGINEER: In a county in which there is no  
COUNTY SURVEYOR: county highway engineer the  
COUNTY COURTS: county planning commission may  
COUNTY PLANNING COMMISSION: nonetheless function.

OPINION NO. 155

July 6, 1967

Honorable H. Dean Whipple  
Prosecuting Attorney  
Laclede County Courthouse  
Lebanon, Missouri



Dear Mr. Whipple:

This is in response to your request for the opinion of this office on the question of whether the County Planning Commission of Laclede County may function inasmuch as that county does not have a county highway engineer.

Laclede is a third class county. Section 64.510, RSMo Supp. 1965, provides authorization for a county planning commission as follows:

"The county court of any county of the second or third class may, after approval by a vote of the people of the county, provide for the preparation, adoption, amendment, extension and carrying out of a county plan for all areas of the county outside the corporate limits of any city, town or village which has adopted a city plan in accordance with the laws of the state. Upon the adoption of the county plan there is created in the county a county planning commission as hereinafter provided."

The members of the county planning commission are specified in Section 64.520 as follows:

"Such county planning commission shall consist of one of the judges of the county court selected by the county court, the county highway engineer, and one resident freeholder appointed by the county court from the unincorporated part of each township in the county, except that no such freeholder shall be appointed from a township in which there is no unincorporated area. Said township representatives are hereinafter

Honorable H. Dean Whipple

referred to as appointed members. The term of each appointed member shall be four years or until his successor takes office, except that the terms shall be overlapping and that the respective terms of the members first appointed may be less than four years. The terms of all other members shall be only for the duration of their tenure of official position. All members of the county planning commission shall serve as such without compensation, except that an attendance fee as reimbursement for expenses, for not to exceed four meetings per year, may be paid to the appointed members of the commission in an amount as set by the county court, not to exceed ten dollars per meeting. The planning commission shall elect its chairman who shall serve for one year."

Section 64.550 provides that, "The county planning commission shall have power to make, adopt and publish an official master plan of the county for the purpose of bringing about coordinated physical development in accordance with the present and future needs." This section also specifies how the official master plan shall be developed, what it may include, provides for hearings and states that, "The adoption of the plan, or part thereof, shall be by resolution carried by not less than a majority vote of the full membership of the county planning commission."

Under these statutes the county planning commission is created by a vote of the people and it is created without regard to the question as to whether the office of county highway engineer is filled or vacant. Moreover, Section 64.520, provides that a majority vote of the commission is sufficient to carry a resolution of the commission to adopt an official master plan of the county. Thus, even if the county engineer was a member of the commission but did not attend any meetings, the commission could still function without his presence. It follows, therefore, that when the county does not have a county highway engineer, such vacancy on the commission does not nullify or make inoperative the adoption of the county plan and creation of the planning commission approved by a vote of the people pursuant to Section 64.510.

We are enclosing a copy of Opinion issued June 27, 1958, to Honorable Charles E. Murrell, Jr., Prosecuting Attorney of Knox County, Missouri, wherein this office held that the county board

Honorable H. Dean Whipple

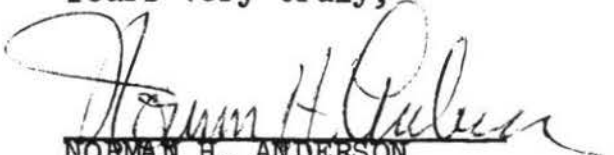
of equalization could function even though the county at that time did not have a county surveyor whom by statute is made a member of the county board of equalization. It appears that the same theories of law should be applied to the county planning commission when the county does not have a county highway engineer.

CONCLUSION

It is the opinion of this office that in a county in which there is no county highway engineer the county planning commission may nonetheless function.

The foregoing opinion, which I hereby approve, was prepared by my assistant L. J. Gardner.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

Enclosure: Opinion to Murrell,  
June 27, 1958.

SCHOOLS:  
RELIGION:  
SCHOOL BUILDINGS:

A public school board may allow the use of public school property by a church college or municipality for civic, social and educational purposes that do not interfere with the prime purposes of the school property

and that where there is an exchange of consideration between the public school district and the church educational institution, then there is no aid to religion.

OPINION NO. 158

August 22, 1967

Honorable Don Witt  
Prosecuting Attorney  
Platte County  
Platte City, Missouri



Dear Mr. Witt:

This opinion is issued in response to your request for an official ruling of this office.

You state that a six-director school district within your county has a building that is only partially used for public school purposes. You inquire:

"1. May said district lease a part or all of the unused portion of said building to a church endowed college in exchange for use by said school district of a facility at the college for public school purposes?

2. May said school district lease all or any part of said unused portion of said building to a city of the fourth class for use as a city hall for cash rent?"

Subsection 2 of Section 177.031, RSMo Supp. 1965, provides as follows:

"2. The school board having charge of the schoolhouses, buildings and grounds appurtenant thereto may allow the free use of the houses, buildings and grounds for the free discussion of public questions or subjects of general public interest, for the meeting or organizations of citizens, and for any other civic, social and educational



Honorable Don Witt

purpose that will not interfere with the prime purpose to which the houses, buildings and grounds are devoted. If an application is granted and the use of the houses, buildings or grounds is permitted for the purposes aforesaid, the school board may provide, free of charge, heat, light and janitor service therein when necessary, and may make any other provisions, free of charge, needed for the convenient and comfortable use of the houses, buildings and grounds for such purposes, or the school boards may require the expenses to be paid by the organizations or persons who are allowed the use of the houses, buildings and grounds. All persons upon whose application, or at whose request, the use of any schoolhouse, building, or part thereof or any grounds appurtenant thereto, is permitted as herein provided, shall be jointly and severally liable for any injury or damage thereto which directly results from the use, ordinary wear and tear excepted."

We assume from your letter that if the facilities are leased to the college, they will be used for educational purposes and if they are leased to the city, they will be used for civic purposes. Both of these purposes are within the provisions of Section 177.031, quoted supra.

You state that this part of the school building is not being used for school purposes at the present time. Therefore, we assume that the requirement that the purpose not interfere with the primary purpose of the school building, as required by Section 177.031, is also met.

You indicate in your letter that the college has a religious affiliation. Therefore, we will consider the question as to whether or not a public school board may allow the use of public school buildings to a religious affiliated educational institution.

In Kintzele v. City of St. Louis, Mo., 347 S.W.2d 695, the plaintiffs complained that the sale of land under the redevelopment law (Chapter 99, RSMo) to a private sectarian school violated the prohibitions of the state and federal constitutions against the use of public funds in the aid of religion. The Supreme Court of Missouri ruled against the plaintiffs contention quoting a New York

Honorable Don Witt

court as follows, l.c. 700:

" \* \* \* '[S]ince this sale is an exchange of considerations and not a gift or subsidy, no "aid to religion" is involved and a religious corporation can not be excluded \* \* \* '."

Your letter indicates that there will be a quid pro quo or exchange of consideration by and between the school and the church college in connection with the use of the public school facilities. In the words of the Missouri Supreme Court, since this transaction is an exchange of consideration and not a gift or subsidy no "aid to religion" is involved.

This office has previously ruled that the state may lease unused property to a church. Enclosed is Opinion No. 81, Sheppard, 8-20-52. Also enclosed is Opinion No. 2, Anderson, 4-4-60 regarding use of public school buildings by individuals or organizations for educational purposes.

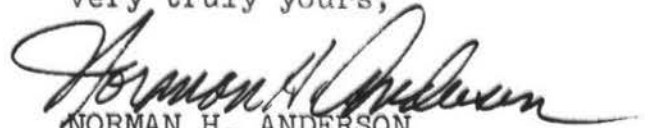
This opinion relates only to the authority of the public school district and makes no ruling upon the authority of the church college or the city to enter into leases.

#### CONCLUSION

Therefore, it is the opinion of this office that a public school board may allow the use of public school property by a church college or municipality for civic, social and educational purposes that do not interfere with the prime purposes of the school property and that where there is an exchange of consideration between the public school district and the church educational institution, then there is no aid to religion.

The foregoing opinion which I hereby approve was prepared by my assistant, Louis C. DeFeo, Jr.

Very truly yours,

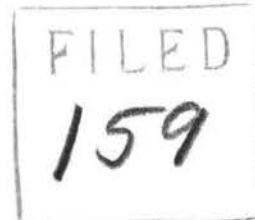
  
NORMAN H. ANDERSON  
Attorney General

CHARTER FORM OF GOVERNMENT: A census taken by a fourth class  
CITY OF THE FOURTH CLASS: city pursuant to Section 81.030,  
CENSUS: RSMo 1959, has the legal force  
and effect of a federal decennial  
census under Section 82.020, RSMo  
1959, for the purposes of a deter-  
mination of the population or number of inhabitants required  
for adoption of a Charter form of government under Article VI,  
Section 19, of the Constitution.

OPINION NO. 159

March 7, 1967

Honorable Everett Carlson  
State Representative, District 19,  
House Post Office  
Capitol Building  
Jefferson City, Missouri



Dear Representative Carlson:

This is in response to your request for an opinion concerning whether or not the City of Lee's Summit is qualified under the law and under the constitution to begin proceedings to adopt a charter form of government.

Article VI, Section 19, of the Constitution states that any city having more than 10,000 inhabitants may frame and adopt a charter form for its own government, and prescribes the manner by which this form of government is adopted.

It is our understanding that the population of Lee's Summit in 1960, according to the federal decennial census, was 8,267 persons. You have also advised that since that census there has been an annexation. However, the total 1960 census with the annexed population did not exceed 10,000 inhabitants. In addition, it is our understanding that Lee's Summit is classified as a fourth class city, having been incorporated in the year 1868.

Section 82.020, RSMo 1959, states:

"Any city in this state which now has or which may hereafter have a population of more than ten thousand inhabitants according to the last preceding federal decennial census may frame and adopt or amend a charter for its own government by complying with

Honorable Everett Carlson

the provisions of sections 19 and 20 of article VI of the constitution of this state, or any amendments thereof."

It appears to us in the absence of any other substantive law bearing upon this point, that Lee's Summit would not qualify inasmuch as the last preceding federal decennial census, that is of 1960, even including the annexed area, did not exceed 10,000 inhabitants.

However, we call your attention to Section 81.030, RSMo 1959, which states in part:

"Any such city may at any time, by ordinance and at the expense of the city, cause an enumeration of its inhabitants to be made, and its population ascertained, and such census, when so taken, shall have like force and effect as a state or national census to authorize such city to proceed in securing such other incorporation as its population may entitle it to under the laws and constitution of this state, and for any other purpose that the laws may require, or have any other act or thing to be done making the population a basis thereof \* \* \*"

The effect of this section then, which pertains to fourth class cities, is to allow such city by ordinance and at its own expense to cause a census to be taken and gives such census when taken as provided in this context, the effect of a federal decennial census. Section 81.030, is therefore applicable to Lee's Summit and having given the city census the like effect and force as the national census, it appears that there is a manner for the adoption of the charter form of government without waiting for another federal decennial census.

#### CONCLUSION


It is, therefore, the opinion of this office that a fourth class city may cause a census to be taken at its own expense pursuant to Section 81.030, RSMo 1959, and that this census will have the like force and effect of a federal decennial census under Section 82.020, RSMo 1959. The city census thus taken as

Honorable Everett Carlson

provided may then be used as the basis for determination of the population or number of inhabitants required for adoption of a charter form of government under Article VI, Section 19, of the Constitution.

This opinion, which I hereby approve, was prepared by my assistant John C. Klaffenbach.

Yours very truly,



NORMAN H. ANDERSON  
Attorney General

June 29, 1967



Honorable Gene E. Voigts  
Prosecuting Attorney of Clay County  
Liberty, Missouri 64068

Re: Advice to Accused Defendant Upon  
Arrest for Traffic Violations

Dear Mr. Voigts:

This is in response to your recent request for an opinion concerning the necessity to warn individuals arrested for traffic violations as may or may not be required under *Miranda vs. Arizona*, 384 U.S. 436, with respect to the use at trial of any admissions they may make.

We presume that you refer to the various misdemeanor and felony traffic offenses provided for in the statutes and not to ordinance violations.

We do not regard the law on the subject to have been developed with sufficient clarity to constitute the basis for a reasonable opinion at this time. Nevertheless, some generalizations are possible.

The mere fact that driving is a privilege would not remove the matter from theegis of the *Miranda* decision. Clearly, the dictates of that decision require that certain formal steps be taken before the product of any accusatory police interrogation may be admitted as evidence at trial.

It may be well to keep in mind that the Supreme Court of Missouri has on at least two occasions made the following observations:



" \* \* \* we do not readily see why the requisites of due process should vary according to the severity of the permissible punishment. \* \* \* " State v. Glenn, 317 SW2d 403, 407.

" \* \* \* we see no readily apparent reason why the minimum standard for due process of law should depend upon the permissible punishment. \* \* \* " State v. Warren, 321 SW2d 705, 709.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

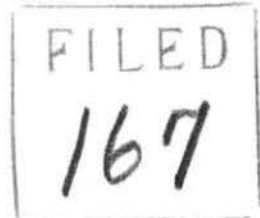
COUNTY COURT:  
WOLF BOUNTY:

Person claiming bounty for killing  
wild animals must personally sub-  
scribe to oath before county clerk.

March 7, 1967

OPINION NO. 167

Honorable Thomas B. Burkemper  
Prosecuting Attorney of Lincoln County  
Troy, Missouri 63379



Dear Mr. Burkemper:

On February 7, 1967, you requested an opinion from this  
office as follows:

"Under RS Mo. 279.020 a person who has killed  
a wolf in the State of Missouri must produce  
the whole pelt thereof for inspection by the  
Clerk of the County Court within three days  
after the killing of the animal and must then  
make his affidavit to that affect.

"As a practical matter herein Lincoln County  
we have individuals who cannot make that  
affidavit within three days because they are  
employed on a daily basis outside of the  
County. These individuals very often send  
their wives or relatives to the Court to  
produce the pelt. However, as I understand  
the statute, the only person who can make  
the affidavit is the person who actually  
killed the wolf. Consequently, many wolf  
bounties have been lost to our County resi-  
dents, causing hard feelings with our court.

"My question is this: Can our County Clerk,  
upon having viewed and inspected the pelt,  
accept an affidavit as required by the statute  
signed before a Notary Public, and not before  
the Clerk."

Honorable Thomas B. Burkemper

Section 279.010 Mo. Cum. Supp. provides in part that the County Court in each county shall pay a bounty for each coyote, wolf or pup and for each wildcat or kitten killed in the County provided it was not raised in captivity.

Section 279.020 Mo. Cum. Supp. provides in part:

"Any person claiming the bounty under this chapter shall produce the whole pelt of the coyote, wolf or wildcat, wolf or coyote pup, or wildcat's kitten and exhibit the same for inspection by the clerk of the county court within three days after the killing of such wild animal or animals, and shall take and subscribe an oath or affirmation that the pelt or pelts produced and exhibited by him had been killed by himself within the three days last past and within such county, and that such pelt or pelts were not taken from any wolf or wolves, wildcat or wildcats, coyote or coyotes, or from wolf or coyote pup or pups or wildcat kitten or kittens raised by him or any other person or persons of whom he had knowledge that such animals were raised in captivity.

"Following such oath or affirmation the said clerk of the county court shall then and there cause the ears of each wild animal pelt or pelts to be perforated by use of an ordinary gun wad cutter or similar device capable of removing a portion of the ears of such animal or animals, which said portion of said ears so removed shall not be smaller than the size of the bore of a twelve-bore shotgun, but not enough larger to spoil the value of such pelt or pelts to be used for commercial purposes.\* \* \* \*"

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Kasten v. Guth*, 375 S.W.2d 110. Under the above statute, the person claiming a bounty must produce and exhibit the whole pelt of the animal for inspection by the clerk of the county court within three days after the killing and shall take and subscribe an oath or affirmation that the pelt exhibit by him was killed by himself within the last three days and within the county and that it was not

Honorable Thomas B. Burkemper

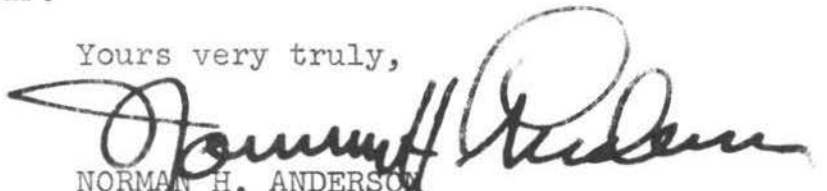
raised in captivity. Following such oath or affirmation, the clerk shall then and there cause the ear of said animal to be perforated in a manner provided in such statute. Considering the fact that under this statute only the person that killed the animal can exhibit it to the county clerk for inspection, we believe the legislature also intends that the oath or affirmation be subscribed in person before the clerk, and that the oath in affidavit form subscribed before a notary would not comply with this statute.

#### CONCLUSION

It is the opinion of this office that a person claiming a bounty for killing wild animals under Chapter 279 RSMo., 1959, as amended, must personally take and subscribe an oath or affirmation before the county clerk and that such oath in affidavit form subscribed before a notary public is not sufficient.

The foregoing opinion which I hereby approve was prepared by my assistant, Moody Mansur.

Yours very truly,



NORMAN H. ANDERSON  
Attorney General

ELECTIONS:  
CORRUPT PRACTICES:  
UNIONS:  
LABOR UNIONS:  
POLITICAL COMMITTEES:  
COMMITTEES:

Two or more persons whether members of labor union or not, collecting and disbursing money to be used in furtherance of election to public office of any person, constitute a political committee and treasurer must file report of expenditures in period during ninety days preceding election including primaries. Statute of limitations under Section 129.260 (3) requiring treasurer to file a statement within five days after request by five freeholders is one year.

May 24, 1967

OPINION NO. 172

Honorable Thomas W. Shannon  
Prosecuting Attorney  
City of St. Louis  
Municipal Courts Building  
14th and Market Streets  
St. Louis, Missouri 63103



Dear Mr. Shannon:

This is in answer to your letter of recent date requesting an official opinion of this office. Your first question reads:

"(1) Assuming a labor union receives voluntary contributions from its members, and then makes political contributions to individual candidates, does that union comprise a committee as defined in Section 129.200 RSMo. 1959?"

Section 129.200, RSMo, 1959, provides as follows:

"Every two or more persons who shall be elected, appointed, chosen or associated for the purpose, wholly or in part, or raising, collecting or disbursing money, or of controlling or directing the raising, collection or disbursement of money for election purposes, and every two or more persons who shall cooperate in the raising, collection or disbursement, or in controlling or directing the raising, collection or disbursement, of money used or to be used in furtherance of the election or to defeat the election to public office of any person or any class or number of persons, or in furtherance of the enactment or to defeat the enactment of any law or ordinance, or constitutional provision, shall be deemed a political committee within the meaning of sections 129.010 to 129.260."

It is obvious from the clear and unequivocal language of Section 129.200, RSMo, 1959, that when two or more persons receive contributions from individuals including members of a labor union

and such two or more individuals make political contributions to candidates for political office that such two or more individuals constitute a political committee within the meaning of Section 129.200 RSMo, 1959.

However, it is equally clear that your first question fails to include factual information upon which to base an answer to the question posed.

A labor union that receives contributions from its members and then makes "political" (as that term is used in Section 129.200 RSMo, 1959,) contributions would comprise a committee as defined in Section 129.200, if there were two or more persons appointed, chosen or associated for the purpose of raising, collecting or dispersing money to be used for political purposes by the union.

It is incumbent upon your office to make a factual determination as to whether or not "labor union" that you refer to in your letter acts through two or more individuals in the raising, collecting or dispersing of said funds for purposes political as defined in Section 129.200.

If your office, after making the factual determination, decides:

(1) That contributions are made and that money is raised, collected, or dispersed;

(2) That the money raised and collected is dispersed for political purposes as set out in Section 129.200 RSMo, 1959, and

(3) That two or more persons are elected, appointed, chosen or associated for the purpose, wholly or in part, of raising, collecting or dispersing money for political purposes, the labor organization, or the committee arising out of the labor organization, that you refer to in your first question would, in the opinion of this office, be deemed a political committee, and the treasurer of that committee would be required to file a report as required by Sections 129.230 and 129.260 RSMo, 1959.

Your second question is as follows:

"(2) Assuming that a request for filing statements is made by five or more resident freeholders as authorized by Section 129.260(3), must this request be filed within one year next after the time limit required by the Statute. In other words, does the normal statute of limitations for misdemeanor (1 year) act as a bar to requests for filing made pursuant to this



statute, or can the 'political committee' be held criminally liable for failing to file in elections prior to one year and thirty days before the request was made?"

Section 129.250 RSMo, 1959, provides as follows:

"Every treasurer of a political committee, as defined in sections 129.010 to 129.260, who shall willfully fail, neglect or refuse to make out, verify and file with the recorder of deeds the statement required by section 129.230 shall be guilty of a misdemeanor, and upon a conviction shall be fined not less than fifty nor more than five hundred dollars."

Section 129.260 (3) RSMo, 1959, provides as follows:

"Every treasurer of a political committee, and every person who shall receive any money to be applied to any of the purposes mentioned in section 129.200, who shall either:

\* \* \* \* \*

"(3) Fail to file the statement and account contemplated by section 129.230 within five days after he shall receive notice, in writing, signed by five resident freeholders of the county in which such treasurer or political committee or person resides, requesting him to file statement and account, shall be guilty of a misdemeanor, and, on conviction, shall be imprisoned in the county jail for not less than two nor more than six months."

Section 129.230 RSMo, 1959, provides that every treasurer of a political committee shall within thirty days after each and every election in connection with which he shall have received or disbursed any money for any of the objects or purposes mentioned in Section 129.200, prepare and file in the office of recorder of deeds a full true and detailed account and statement of monies received or disbursed by him within the period beginning ninety days before such election and ending on the date on which such statement is filed.

It is to be noted that Section 129.250 is specifically applicable to the treasurer of a political committee and makes it a misdemeanor for such treasurer to fail, neglect or refuse to file

with the recorder the statement required by Section 129.230 and provides that the person guilty of such misconduct shall be fined not less than fifty dollars and not more than five hundred dollars.

Section 129.260 (3) is also applicable to a treasurer who fails to file the statement and account provided for in Section 129.230, which account must be filed within thirty days after the election under the provisions of Section 129.230. Section 129.260 (3) is applicable only if the treasurer fails to file the statement required by Section 129.230 within five days after receiving notice in writing signed by five resident freeholders of the county requesting him to file such statement and account.

Such Section provides a much more severe punishment than Section 129.250 since the punishment provided under Section 129.260 (3) is that the treasurer upon conviction be imprisoned in the county jail for not less than two and not more than six months.

It can be seen that the unlawful conduct made criminal by Sections 129.250 and 129.260 (3) is exactly the same, that is, that each makes unlawful the failure of the treasurer to comply with the provisions of Section 129.230, the only difference being that a greater punishment is prescribed under Section 129.260 (3) if the treasurer can be shown to have failed to make the statement required under Section 129.230, within five days after being requested to do so in writing by five freeholders of the county.

Under the provisions of Section 541.210 RSMo, 1959, no person can be prosecuted for a misdemeanor unless the indictment be found or prosecution instituted within one year after the commission of the offense.

It is obvious that the statute of limitations under Section 129.250, the violation of which is a misdemeanor starts to run thirty days after an election for which a political committee treasurer is required to file a statement under Section 129.230.

It is our view that the statute of limitations under Section 129.260 (3) would also start to run thirty days after an election for which a political committee treasurer is required to file a statement under Section 129.230. Since the elements of the misdemeanor denounced by Section 129.250 and 129.260 (3) are exactly the same, it is obvious that the Statute of Limitations is one year after the commission of the offense which offense occurs when the treasurer fails to file the statement within the thirty day period found in Section 129.230.

As stated above, the only difference between Section 129.250 and 129.260 (3) is that a greater punishment is provided under Section 129.260 (3) for exactly the same unlawful conduct if the treasurer refuses to make such statement within five days after being requested to do so by the five resident freeholders.

Under the provisions of Section 19 of Article I of the Missouri Constitution, no person can be convicted twice for the same offense.

We believe it to be obvious that the crimes contemplated by Section 129.250 and Section 129.260 (3) are the same. It is apparent on the face of such Sections that a conviction under Section 129.250 of the treasurer for failing to file the statement within the thirty day period required by Section 129.230 would be a complete defense to any conviction or punishment under Section 129.260 (3) because the elements of the crimes under both Sections are exactly the same and the same facts would have to be proved under each section, the only difference being that a greater punishment is authorized under Section 129.260 (3) if the proof shows that the treasurer failed to file a statement within five days after being requested to do so in writing by five resident freeholders of the county.

Obviously, if the crimes are the same, the running of one year following the period of thirty days after an election would under Section 129.250, completely bar prosecution for failure to file the statement required by Section 129.230. Such running of the Statute of Limitations in criminal cases operates as an absolute bar to a prosecution, *State vs. Civella* 364 SW2d 624. Since the crimes denounced by Section 129.250 and 129.260 (3) are exactly the same and only an increased punishment is provided under Section 129.260 (3), we believe it to be clear that the Statute of Limitations must be held to be the same under both Sections since violations of both constitute misdemeanors and therefore, the Statute of Limitations applicable to violations of Section 129.260 (3), is one year and begins to run thirty days after an election at which statements by political committee treasurers are required under Section 129.230.

We would reach an absurd result if it were held that the Statute of Limitations under Section 129.260 (3) begins to run only after five resident freeholders have made a demand in writing. If such were held to be the case, five resident freeholders could make such a demand fifty years after an election and the Statute of Limitations would then start running making a total period in which prosecution could be begun of fifty-one years. The absurdity of this holding can be seen in view of the fact that no person can be tried for any felony other than a capital offense more than three years after the commission of such felony unless an indictment be found or an information be filed except for bribery or corruption in office in which the limitation is five years. It is apparent that it could not have been the legislative intent that an unlimited period for prosecution of a misdemeanor, the maximum punishment for violation of which is six months in jail be authorized in view of the fact that the Statute of Limitations for felonies for violation of which the punishment may be as much as fifty years in the penitentiary is only five years.

We believe this to be particularly true in view of the favor with which Statutes of Limitations are regarded by the courts. In the case of Ponica vs. Purdome 254 SW2d 673, the Kansas City Court of Appeals succinctly stated this doctrine, l.c. 676:

" \* \* \* \* Statutes of limitation instead of being frowned upon by the courts are viewed with favor."

While the opinion in this case was quashed by the Supreme Court the correctness of the statement that Statutes of Limitations are looked upon with favor by the courts, was not challenged.

In the case of State ex rel. v. Carter, 319 SW2d 596, the Supreme Court of Missouri held that the Corrupt Practices Act of which this Section is a part is penal in nature and must be strictly construed. The court said, l.c. 598:

"The Corrupt Practices Act, of which §§ 129.110 to 129.130 are a part, is penal in nature and should be strictly construed. State ex inf. Burgess ex rel. Hankins v. Hodge, 320 Mo. 877, 8 S.W.2d 881, 884; State ex rel. Crow v. Bland, 144 Mo. 534, 46 S.W. 440, 41 L.R.A. 297. When we say a statute should be strictly construed we generally mean that it can be given no broader application than is warranted by its plain and unambiguous terms. City of Charleston ex rel. Brady v. McCutcheon, 360 Mo. 157, 227 S.W.2d 736, 738[2]; \* \* \*"

Since such statute must be strictly construed, it is our view that the request by the five freeholders must be made within a reasonable time since the statute is silent as to the time within which the request must be made.

The purpose of Section 129.260(3), is obviously to make a more severe penalty applicable when a political committee treasurer has not complied with the law requiring that he file within thirty days after the election concerned, a statement of money received and disbursed. It is known immediately after the expiration of thirty days after such election whether the treasurer has filed the required statement and such section at that time gives a right to five freeholders of the county to make a more severe penalty applicable if the treasurer refuses to file the required accounting within five days after being so requested. In view of this, we believe it to be clear that the statute contemplates that such request by the freeholders must be brought within a reasonable time.



In the case of *Monterrosso v. St. Louis Globe-Democrat Publishing Co.*, 368 SW2d 481, the Supreme Court of Missouri had before it a construction of Section 290.110, RSMo, 1959, which Section provides that when a person is discharged by his employer the wages due him shall be payable on the discharge date and that if not paid within seven days after a written request therefor, by the employer, the wages shall continue from the date of discharge until paid; provided that wages shall not continue for more than sixty days unless an action is begun within such period. The Court held that the employee's request for payment must be made within a reasonable time, even though the statute is silent as to the time within which the written request must be made. The Court said, l.c. 489:

"Finally, plaintiffs' requests for payment under § 290.110 were not timely. While the time within which request for unpaid wages shall be made is not stated it is clear by necessary implication that the request must be made within a short time after discharge. One of the objects of the statute is to effect a quick payment to the wage earner of wages due and unpaid at time of discharge. By the proviso it is contemplated that unless actions for the prescribed penalty be commenced within sixty days from date of discharge or refusal to further employ, the penalty of continuing wages will not continue more than sixty days. While request for unpaid wages need not be made immediately after discharge, it must be made within a reasonable time. Every request in the instant case was made at least ninety days after date of discharge, and in some cases as much as one hundred eighty days thereafter. Having in mind the objects and purposes of the statute, and the sixty-day limitation on actions, we rule that ninety days is an unreasonable length of time within which to make request for unpaid wages under § 390.110 and therefore plaintiffs' requests came too late."

In view of the fact that the failure of the political committee treasurer to file the statement is made a misdemeanor and the Statute of Limitations for misdemeanors is one year, it is our holding that a period greater than one year after such statement should have been filed is an unreasonable time for the freeholders to give the notice provided for in Section 129.260(3).

The third question is as follows:

"(3) Is a primary election an election within the meaning of 129.260 (3)?"

The ascertainment of legislative intent in enacting a statute is the object of all rules of statutory construction. The Supreme Court in the case of State ex rel. v. Carter, supra, stated l.c. 599:

"The basic rule of statutory construction is first to seek the intention of the law-makers and, if possible, to effectuate that intention. Laclede Gas Company v. City of St. Louis, 363 Mo. 842, 253 S.W.2d 832, 835 [2]. The court should ascertain the legislative intent from the words used if possible and should ascribe to the language used its plain and rational meaning. A.P. Green Fire Brick Co. v. Missouri State Tax Commission, Mo., 277 S.W.2d 544, 545 [3]; Tiger v. State Tax Commission, Mo., 277 S.W.2d 561, 564 [2]. \* \* \*"

It is our view that the legislative intent in the enactment of Sections 129.200 and 129.230, was to provide for publicity for all contributions to and expenditures by candidates for office so that the people generally would have full information as to the source of financial support of the various candidates for office and the recipients of expenditures of all candidates for office. We believe that it is obvious that such information concerning receipts and expenditures by candidates at primary elections is as necessary as is such information concerning receipts and expenditures by candidates at any other election.

We are aware of the fact that in some cases our courts have held primary elections not to be "elections" insofar as, particular statutory provisions are concerned. In the case of Dooley v. Jackson, 104 Mo. App. 21, the St. Louis Court of Appeals held that a statute relating to betting on elections did not apply to primary elections. Such holding was based on the fact that such statute provided that it was applicable to elections authorized by the Constitution and laws of the state, and the court held that a primary election was not authorized by the Constitution of the state because there was no constitutional direction regarding primary elections.

In the case of State ex rel. v. Graham, 246 Mo. 259, the Supreme Court held that a state primary election was not an election within the meaning of a law prohibiting the holding of a local option election within sixty days of a state election. The court held that the language in such statute showed a legislative intent to refer only to the state biennial elections held in November of even-numbered years, because of the use of the term "general election" in the first section of such law.



However, in the case of Dysart vs. St. Louis, 11 SW2d 1045, the Supreme Court held that a primary election is a general election. The Court said, l.c. 1052:

" \* \* \* Therefore it avails nothing to distinguish a primary election from the statutory definition of any other general election."

Therefore, it is our view that while Section 129.230, must be strictly construed, it is apparent that the legislative intent requiring an accounting of contributions and expenditures by political committee treasurers is applicable to contributions and expenditures during the ninety days preceding a primary election as well as the ninety days preceding other elections.

#### CONCLUSION

It is the opinion of this office that:

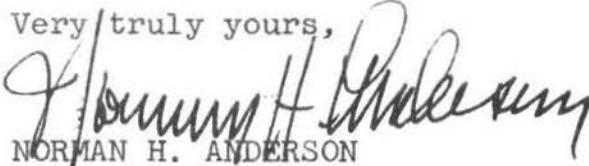
1. When two or more individuals, whether members of labor unions or not, receive voluntary contributions and use such contributions in aid of candidates for public office, such individuals comprise a political committee as defined in Section 129.200 RSMo, 1959, the facts must be examined in each case in which it is alleged a political committee exists to determine whether, as a matter of fact, two or more persons are receiving contributions and using such funds in aid of candidates for public office.

2. The Statute of Limitations, applicable to Section 129.260 (3), RSMo, 1959, is one year, and a request by five freeholders of the county asking that a political committee treasurer file an accounting as required by Section 129.230 RSMo, 1959, has no validity if filed more than one year after the date upon which the statement is required to be filed by the treasurer under Section 129.230, and failure of the treasurer to comply with such demand is not a crime.

3. A primary election is an election within the meaning of Section 129.260 (3) requiring the filing of an accounting of receipts and expenditures by the treasurer of a political committee.

The foregoing opinion of which I hereby approve was prepared by my assistant, Mr. C. B. Burns, Jr.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

ROADS:  
BRIDGES:

Where a public road is closed or abandoned, the county would have a reasonable time to remove a bridge located on a county road. Title to the bridge does not revert to the adjoining landowners.

OPINION NO. 174

July 20, 1967

Honorable Thomas P. Baker  
Prosecuting Attorney  
Putnam County  
Unionville, Missouri



Dear Mr. Baker:

This opinion is prepared to answer your inquiry whether the title to a county bridge located on a county road that was duly vacated is vested in the county or the adjoining landowners to the vacated road.

We further assume that the county, within a reasonable time of the abandonment of the road, seeks to obtain the possession of the bridge; and further, that there is no provision, either by deed or otherwise, that the bridge should become the property of the landowner if such road was closed or abandoned.

The Springfield Court of Appeals in Special Road District No. 4 of Bollinger County vs. Stepp, 4 S.W.2d 480, 481 decided the question where the Court ruled as follows:

"[4] Defendant at the trial contended that he had relinquished the right of way at and approaching the bridge, with a reservation that, when the right of way was no longer used for a road, it would revert to him. He claims to have executed and delivered to the county court a right of way deed containing such reservation, but no such deed was produced, and a diligent search failed to find such deed. Defendant, however, introduced evidence tending to show that he did execute and deliver such deed, but he says himself that there was no provision in the deed whereby the bridge should be his property if the road on which it was

Honorable Thomas P. Baker

installed was abandoned as a public road.  
\* \* \* \* Defendant was clearly in the wrong  
and plaintiff, under the law, was clearly  
entitled to the remedy it sought."

We conclude, based on the above decision, that the county  
would own the bridge upon abandonment of the road under the assumed  
facts which are set out above.


CONCLUSION

It is the opinion of this office that:

Where a county road on which there is a county bridge is  
duly abandoned, the county retains title and the right of removal  
of the bridge provided such removal is done within a reasonable  
time after abandonment of the county road.

The foregoing opinion which I hereby approve was prepared  
by my assistant, Richard C. Ashby.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

CONSTITUTIONAL LAW: Statute requiring operators or passengers  
MOTORCYCLE: on motorcycles to wear helmets constitutional.  
HIGHWAY PATROL:

OPINION NO. 179

March 23, 1967

Honorable John A. Grellner  
State Representative, 40th District  
St. Louis County  
7446 Richmond  
Maplewood, Missouri 63143



Dear Representative Grellner:

This is in response to your letter of February 16, 1967, in which you request an opinion from this office as to the constitutionality of mandatory legislation requiring operators and riders of motorcycles to wear safety helmets. Due to the fact that such a bill is now pending before a legislative committee, you requested a prompt opinion on this matter.

Due to the urgency of this opinion request on this matter, our research has been limited, but we have been unable to find any court decisions in any state or in this state concerning the issue. It is a fundamental rule applied by the courts of this state in construing statutes to presume the statute constitutional until the contrary plainly appears, and it is only when it manifestly infringes on some provision of the Constitution that it can be considered void.

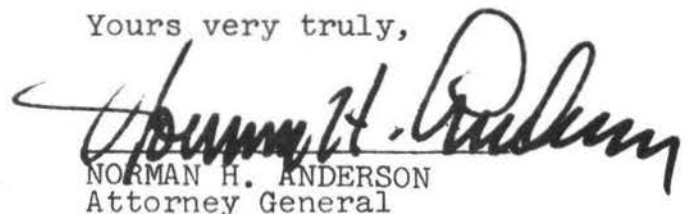
We do not find any constitutional provision that we believe would be violated by legislation requiring drivers and passengers on motorcycles to wear safety helmets.

We are in this letter passing only on the question you raised as to whether legislation requiring drivers and passengers on motorcycles to wear safety helmets is unconstitutional.

We do not pass upon the specific provisions of House Bill No. 225 of the 74th General Assembly as to any objections that might be raised concerning such Bill on any other point.

The foregoing opinion, which I hereby approve was prepared by my assistant Moody Mansur.

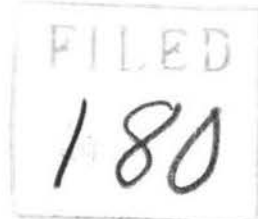
Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

OPINION NO. 180  
(Answered by Letter--  
Nowotny)

March 20, 1967

Honorable James A. Noland, Jr.  
Representative, District 140  
Capitol Building  
Jefferson City, Missouri



Dear Representative Noland:

This is in answer to your request for an opinion of this office, which request reads as follows:

"I am asking you for an opinion regarding a conflict of tax matter. It concerns a person raising commercial fish within the bounds of his own property with none of the Federal stock being so situated as to come in contact with any fish in the public streams of Missouri; the said stock being purchased from areas outside the state of Missouri, being solely raised for the purpose of being processed for food. Are these fish subject to control of the Conservation Commission and also subject to the paying of fees to the Conservation Commission for raising of said fish, when the stock is assessed as personal property the same as poultry and livestock and other domestic animals in Missouri?"

Your question is whether a person raising these fish must obtain a wildlife breeder's permit from the Conservation Commission and also pay personal property tax on the fish when these fish are property of the state.

Enclosed is a copy of Attorney General Opinion No. 15, dated March 22, 1955, to the Honorable John R. Caslavaka, which answers the same question in relation to captive minks. That opinion held captive minks that are wildlife and kept by a private individual for commercial purposes, even though subject to regulation by the Conservation Commission, are taxable personal property.

Honorable James A. Noland, Jr.

Also enclosed is a copy of Attorney General Opinion No. 21, dated July 6, 1955, to the Honorable Dick B. Dale, Jr., which holds that fish purchased and used to stock private commercial fishing ponds are wildlife and that the owner of the pond must obtain a wildlife breeder's permit.

In view of these two opinions, it is our opinion that a person raising fish as described in your request must obtain a wildlife breeder's permit.

This person is not liable for a tangible personal property tax on these fish because he is subject to a merchants license tax. Section 137.115, RSMo 1959, provides an exemption from the personal property tax on merchandise upon which a person is required to pay a merchants tax.

Enclosed is Attorney General Opinion No. 21, dated July 20, 1961, to the Honorable Bill Davenport, which holds that minnows in possession of a licensed, privately owned, minnow hatchery are not to be assessed as personal property but rather are to be assessed and taxed under the merchants tax as set out in Sections 150.010 through 150.070, RSMo. Also enclosed is Attorney General Opinion, dated September 20, 1950, to the Honorable Clarence Evans, upon which Opinion No. 21 is based.

In view of Opinion No. 21, it is our opinion that in the situation described in your request such a person must pay a merchants tax and obtain a merchants license.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

WWN/jlf  
Enc.--4

Op. No. 15, Caslavaka, 3/22/55  
Op. No. 21, Dale, 7/6/55  
Op. No. 21, Davenport, 7/20/61  
Op., Evans, 9/20/50

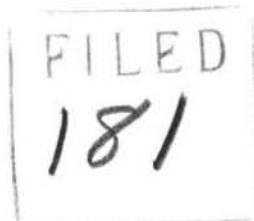


INSURANCE: Articles of Incorporation of American Patriot Life Insurance Company.

February 23, 1967

OPINION NO. 181

Honorable Robert D. Scharz  
Superintendent  
Division of Insurance  
Jefferson City, Missouri



Dear Mr. Scharz:

By letter dated February 20, 1967, you requested an opinion from this office as to whether documents submitted by American Patriot Life Insurance Company are in accordance with Chapter 376 of the statutes and are not inconsistent with the Constitution and laws of this State and of the United States. These documents consist of photographic copies as follows: the Declaration of Intention of the original incorporators of American Patriot Life Insurance Company; the proposed Articles of Incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1959; and the Publishers Affidavit as to publication of said Articles as required by Section 376.050, RSMo 1959.

The objects and purposes of the corporation and the kinds of insurance business which it proposes to transact are set forth in **ARTICLE THREE** of the proposed Articles of Incorporation. The company proposes to make insurance upon the lives of individuals and to provide indemnity against disability or loss resulting from accident, disease or illness. Section 376.010, RSMo 1959, requires that accident and health insurance shall be made a separate department of the business of the life insurance company undertaking such insurance. Although the proposed Articles of Incorporation are silent in regard to the requirement for a separate department as provided by Section 376.010, such statutory requirement shall apply to the proposed corporation and should be specifically brought to the attention of the corporators.

Honorable Robert D. Scharz

Upon an examination of the documents referred to in the first paragraph hereof, as required by Section 376.070, RSMo 1959, the documents are found by this office to be in accordance with the provisions of Chapter 376, RSMo 1959, and not inconsistent with the Constitution and laws of this State and of the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant Thomas J. Downey.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

TJD:db

JUVENILE COURTS:  
CHILDREN:  
COUNTY COURTS:

It is mandatory that a fourth class county pay  
cost of foster home care.

OPINION NO. 182

April 11, 1967

Honorable Edward M. Wetton  
Prosecuting Attorney of Carter County  
Van Buren, Missouri 63965



Dear Mr. Wetton:

Recently you submitted an opinion request as follows:

"Mr. Clarence Coleman, County Clerk, Carter County, Missouri, has advised me that our county is suddenly faced with the problem of foster child care; in the immediate instance of a family of two minor children in Ellsinore, Missouri, who have been abandoned by their natural mother. These children are in dire need of assistance, and are receiving it.

"Mr. Coleman has propounded this query: Is it mandatory that the County Court participate in foster child care?

"Mr. Coleman also advised that he was told that the county receives 90% reimbursement from the state, but a study of House Bill, 1965 does not appear to answer this question.

"I would appreciate your guidance in this matter."

We assume for the purposes of this opinion that the juvenile court has assumed jurisdiction over the children mentioned in your letter.

Carter County is a fourth class county and laws applicable to fourth class counties would have to be followed in arriving at the answer in your letter.

Under Section 211.031, RSMo, the juvenile court has exclusive jurisdiction in proceedings involving neglected or delinquent children as defined therein including a child without proper care,

Honorable Edward M. Wetton

custody or support. Under Section 211.181, RSMo, the juvenile court may commit such child to the custody of a public agency or institution authorized by law to care for children or place the child in a family home. Under Section 211.241, RSMo, the court may, either on its own motion or upon application of any person, institution or agency having custody of such child, inquire to the ability of the parent to support or contribute to the support of such child and if the court finds the parent is able to support or contribute to the support, the court may enter such an order which order may be enforced by execution as provided therein. If the court finds the parent is not able to support the child as provided herein, the necessary support shall, unless the court commits the child to a person or institution willing to receive the child without a charge, be paid by the county, but only upon approval of the judge of the juvenile court. It is our opinion under this statute that it is mandatory that the county pay for the support of the child in such amount as is determined by the juvenile court upon the order of the said court.

Under Section 207.020 (17), RSMo Cum. Supp., 1965, the State Division of Welfare has authority to accept for social services, dependent or neglected children in second, third and fourth class counties when legal custody is vested in the division by the juvenile court. However, before the juvenile court is authorized to vest custody in the Division of Welfare, the Division of Welfare must notify the court that it has adequate facilities and appropriated funds available to care for said child and when this is done, the cost should be paid jointly with the county and the Division of Welfare, with reimbursement by the Division of Welfare of not less than 50 per cent of the cost to be paid quarterly to the county upon receipt and approval of an itemized statement of such expenditure.

Under this statute, the State Division of Welfare is not required to accept custody of a child unless it has adequate facilities for said child together with available funds to pay the cost for support and care. If custody is accepted the cost shall be paid jointly with the county and the Division of Welfare is to reimburse the county quarterly by not less than 50 per cent of the cost. It is our opinion that under this provision, it is mandatory that the county pay the cost for foster home care for a child whose custody is vested in the Division of Welfare by the juvenile court as provided in the above statute. Under this statute, the percentage of reimbursement may in the discretion of the Division of Welfare exceed 50 per cent of the total expenditure made by the county, but it must pay at least 50 per cent to the county.

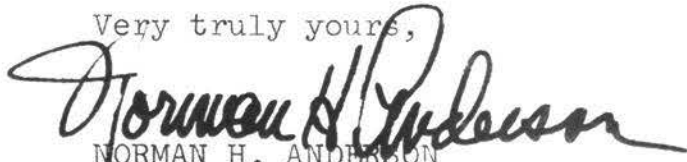
Honorable Edward M. Wetton

CONCLUSION

It is the opinion of this office that when legal custody of a neglected child is vested in the State Division of Welfare by the juvenile court under Section 207.020, RSMo Cum. Supp., 1965, it is mandatory that the county court pay the cost of foster home care and the county is to be reimbursed quarterly by the State Division of Welfare for at least 50 per cent of such expenditure.

The foregoing opinion which I hereby approve was prepared by my Assistant, Moody Mansur.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General

March 9, 1967

Honorable Homer D. Wampler, III  
Assistant Prosecuting Attorney  
Greene County  
Springfield, Missouri 65802



Dear Mr. Wampler:

This is in answer to the question raised in your recent letter as to the constitutionality of Section 303.150, RSMo 1959, as against the allegations that the provisions of this statute were not clearly expressed in the title in violation of Article III, Section 23, of the Missouri Constitution.

Our office has not issued any opinion on this point nor has it been involved in any litigation relating to this particular constitutional attack on this section. However, upon consideration of the title of the act and the provisions of the statute, we feel that Section 303.150 is not unconstitutional.

This section was first enacted by the 67th General Assembly in 1953, as a part of House Bill 19. The bill was entitled:

"AN ACT to repeal chapter 303, consisting of sections 303.010 to 303.340, RSMo 1949 and section 303.220, RSMo 1959 Supp., relating to the motor vehicle safety responsibility law, and to enact a new chapter to be known as chapter 303, consisting of thirty-six new sections numbered sections 303.010 to 303.360, relating to the same subject." Laws Missouri 1953, page 569.

The section in question was originally enacted as Section 303.170, page 478, but was renumbered in the 1959 Revised Statutes as Section 303.150. See Section 3.060, RSMo 1959.



Honorable Homer D. Wampler, III

The subject of House Bill 19, as indicated by its title, is the safety responsibility law. Included under this very general title are all of the provisions enacting, governing, and administering this law. Several of the various sections enacted as a part of this bill define the circumstances under which persons may become subject to the requirements of the law. One of these circumstances is that provided by Section 303.150 which requires that those persons whose drivers license has been suspended or revoked must show compliance with the safety responsibility provisions before their privilege may be reinstated. In our opinion there is little doubt that the section setting forth this requirement is within the purview of the title of the act.

Although this office has not briefed this point as regards Section 303.150, we did brief the question in *IBM v. David*, 408 S.W.2d 833, relating to a revenue law, and we have enclosed herewith a copy of our brief in this case which we hope will be of help.

It appears from the enclosed brief that defendant is under the misapprehension that the heading placed on the section by the revisor of statutes is the title, but this is not so. This, as other such headings, is merely an arbitrary designation inserted for convenience or reference by clerks or revisors who have no legislative authority and does not reflect the meaning of the statute. *State v. Maurer*, Mo., 164 S.W. 551; *Phillips Pipe Line Co. v. Brandstetter*, Mo.App., 263 S.W.2d 880; *Southwestern Bell Telephone Co. v. Drainage District No. 5*, Mo.App., 247 S.W. 494; Section 3.050, RSMo 1959. Thus the heading placed on a particular act or law is not the title, and should not be considered in determining whether the provisions of the act are clearly expressed in its title.

We feel the state must take the position that a statute must be presumed constitutional and a reading of the statute in question clearly shows its provisions are within the purview of the title and not unconstitutional in derogation of Article III, Section 23, of the Missouri Constitution. If an adverse decision is rendered by the magistrate, our office should be notified and the matter appealed as soon as possible.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

Enclosure

March 14, 1967



Honorable Arlie H. Meyer  
State Representative - District 105  
Capitol Building  
Jefferson City, Missouri

Dear Mr. Meyer:

This is in response to your request for an opinion dated February 28, 1967, which makes the following inquiry:

"A third class city presently operating under a Mayor-Council form of government is considering the drafting of a Home-Rule Charter. Can a city councilman elected by qualified voters run for a Home Rule Charter Commission without resigning from the city council? If the councilman wins a post on the Home Rule Charter Commission, can he legally maintain his city councilman's post while the charter is being drafted and voted upon?"

This question involves a construction of Section 19, Article VI of the Constitution relating to the formation of a Constitutional Charter City. This section is rather lengthy but spells out in detail how any city may determine whether it wishes to form a Constitutional Charter. This Section provides in part as follows:

"\* \* \*The question, and the names or the groups of names of the electors of the city who are candidates for the commission, shall be printed on the same ballot without party designation. Candidates for the commission shall be nominated by petition signed by not less than two per cent of the qualified electors

Honorable Arlie H. Meyer

voting at the next preceding city election, and filed with the election body or official at least thirty days prior to the election; provided that the signatures of one thousand electors shall be sufficient to nominate a candidate. If a majority of the electors voting on the question vote in the affirmative, the thirteen candidates receiving the highest number of votes shall constitute the commission. \* \* \*

It will be noted that the only reference to qualifications of persons to serve on the Charter Commission is that they be electors. Therefore, if a City Councilman of the city is an elector he would be qualified to be a candidate as a member of the Charter Commission.

We perceive no reason why there would be any inconsistency or incompatibility in a person service as a City Councilman while at the same time serving as a member of the Charter Commission.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

SIX DIRECTOR SCHOOL DISTRICTS: A six director school district is a  
PARKS: public corporation and under Section  
177.101 RSMo Supp. 1965 when applicable,  
certain six director school districts are authorized to establish and  
maintain parks within their districts.

OPINION NO. 190

July 13, 1967

Honorable Robert L. Dunkeson  
Executive Secretary  
State Inter-Agency Council for  
Outdoor Recreation  
1203 Jefferson Building  
Jefferson City, Missouri 65101



Dear Mr. Dunkeson:

This opinion is issued in response to your inquiry about the authority of a six director school district to establish a park using funds of your agency. In a subsequent conversation with a member of this office, you stated there were essentially two questions that you desired answered which we state as follows:

"1. Is a six director district a public corporation?

"2. Could a six director school district purchase and operate a public park?"

Your first question is answered in the affirmative. Our opinion is predicated upon Section 162.311 RSMo Supp. 1965 and decisions of the Missouri Supreme Court. Section 162.311 Supp. reads as follows:

"The board of directors of a six-director district at its first meeting shall adopt and enter of record the name of the district and shall notify the county board of education and the clerk of the county court of the name so adopted. The name adopted shall comply with any applicable regulations of the state board of education. The district may sue and be sued in the name adopted under this section and possesses the same corporate powers and is governed by the same laws as common school districts except as herein provided.

Honorable Robert L. Dunkeson

"2. The board shall keep a common seal with which to attest its official acts."

Obviously this Section confers upon six director school districts the right "to sue and be sued in the name adopted under this section."

The Missouri Supreme Court has held that a school district is a "public corporation". We cite the cases of Southern Reynolds County School District R-2 vs. Callahan, 313 S.W.2d 35; Kansas City vs. School District of Kansas City, 201 S.W.2d 930; Harrison v. Hartford Fire Insurance Company of Hartford, Connecticut (D.C.Mo.) 55 F.Supp. 241.

Your second question is also answered in the affirmative. Our authority for this statement is based upon Section 177.101 RSMo Supp. 1965 which reads as follows:

"In six-director districts as specified in this section, the school board may establish and maintain public parks and playgrounds for the use of the public school district, and may appropriate the sums they deem proper for the support thereof, not to exceed in any one year two thousand five hundred dollars for districts in cities of twenty thousand and under one hundred thousand inhabitants, and not to exceed five hundred dollars for districts in cities of five thousand and under twenty thousand inhabitants, and not to exceed two hundred and fifty dollars for districts in cities of one thousand and under five thousand inhabitants.

"The school board may lease or purchase grounds additional to the schoolhouse site, either adjacent thereto or elsewhere in the school district, for libraries, public parks and playgrounds and pay for the grounds so leased or purchased out of the funds of the school district available for the purpose.

Honorable Robert L. Dunkeson

"The board of education shall have full custody and control of the parks and playgrounds including the policing and preservation of order thereon and may permit the use of the grounds that it deems best in the interest of the district. The board shall adopt and enforce, subject to the laws of the state and the ordinances of the city, suitable rules and regulations for the control of the grounds and the conduct of persons using them."


When authorized by the above statute, a school board is authorized to purchase additional ground either adjacent to the schoolhouse site or elsewhere in the school district for a public park and pay for the grounds so purchased out of the funds of the school district, available for that purpose. Thus, a grant by your agency to the school district as described in Section 171.101 to acquire land to establish a public park would make available to the school district funds within the meaning of this statute for the purchase of a public park.

#### CONCLUSION

1. A six director school district is a public corporation.
2. As provided by Section 171.101 RSMo Supp. 1965, certain six director school districts may purchase and operate a public park.

The foregoing opinion which I hereby approve was prepared by my assistant, Richard C. Ashby.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General



October 17, 1967

OPINION NO. 193  
Answered-by-Letter(Burns)

Honorable Gene McNary  
Prosecuting Attorney  
St. Louis, County  
Courthouse  
Clayton, Missouri 63105



Dear Mr. McNary:

This is in answer to your letter of recent date in which you inquire whether the records kept under Section 66.200, RSMo Supp. 1965, are public records within the purview of Section 109.180, RSMo Supp. 1965, and therefore available to public inspection generally.

It is our view that the records kept under Section 66.200, are not public records available for inspection by all members of the public. Section 109.180 provides that state, county and municipal records kept pursuant to statute or ordinance shall at all reasonable times be open for a personal inspection by any citizen of Missouri except as otherwise provided by law. It is our view that the records kept under Section 66.200 are not public records because it is otherwise provided by law. Section 66.200 provides that all such records shall be available to the municipal police and Section 66.220, RSMo Supp. 1965, provides that the State Highway Patrol shall have access to all records of the county. The provisions in such Sections, that the municipal police and State Highway Patrol shall have access to such records show a legislative intent that such records are not open for inspection by the public generally but are available only to such police officers. If it were the legislative intent that such records were available to all citizens of the State of Missouri, the provisions relating to municipal police and the Highway Patrol would be absurd, vain and useless enactments.

In the Case of Laclede Gas Company vs. City of St. Louis,

Honorable Gane McNary

253 S.W.2d 832, the general rule regarding statutory construction is succinctly stated by the Supreme Court of Missouri, l.c. 835:

"It is so elementary as to require no citation of authority that the basic rule of construction of an ordinance or statute is to first seek the lawmakers' intention, and if possible to effectuate the intention. The law favors constructions which harmonize with reason, and which tend to avoid unjust, absurd, unreasonable or confiscatory results, or oppression. \* \* \* "

In the case of Superior Minerals Co. vs. Missouri Pac. R. Co., 45 S.W.2d 912, the St. Louis Court of Appeals pointed out that in construing a statute it is to be presumed that no absurd or vain or useless use of words is intended. The Court said l.c. 915:

"Now in construing section 3309, R. S. 1929, we are bound to search for, and to give effect to, the true legislative intent expressed therein to the extent that the language used legitimately reveals it; and it is to be presumed that the entire section was designed to have a purpose and an effect, and that no absurd or vain use of words was employed."

In the case of Graves vs. Little Tarkio Drainage Dist. No. 1, 134 S.W.2d 70, the Supreme Court of Missouri held that every part of a statute is to be given effect and that the presumption is that the legislature did not intend any part of a statute to be without meaning and effect. The Court said l.c. 78:

" \* \* \* 'It is an elementary and cardinal rule of construction that effect must be given, if possible, to every word, clause, sentence, paragraph, and section of a statute, and a statute should be so construed that effect may be given to all of its provisions, so that no part, or section, will be inoperative, superfluous, contradictory, or conflicting, and so that one section, or part, will not destroy another. Sutherland on Statutory Construction (2d Ed.) 731, 732, §380. Moreover, it is presumed that the Legislature intended every part and section of such a

Honorable Gene McNary

statute, or law, to have effect and to be operative, and did not intend any part or section of such statute to be without meaning or effect. \* \* \* "

Since the legislature has provided that the municipal police and the Highway Patrol shall have access to the records provided for in Section 66.200, it is presumed that such provisions are not useless but are intended to and do have meaning and effect. Therefore, it is clear that in view of such provisions, the records required to be kept under Section 66.200 are not records open to inspection by the public generally.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

CRBJr:fls:ag

March 30, 1967



Honorable William R. Royster  
State Representative  
House Post Office  
Capitol Building  
Jefferson City, Missouri

Dear Representative Royster:

On March 2, 1967, you submitted an opinion request as follows:

- "1. Can a person convicted of a felony vote in Missouri in general, and Jackson County specifically?
- "2. If a person has voted who has a felony conviction in his record, what is the penalty?
- "3. If a person has falsely stated, in his application to vote, that he has no felony conviction, what is the penalty?
- "4. Does a parole or a pardon have any effect on the above three questions?"

We are enclosing herewith opinions issued by this office, one dated January 25, 1951, to Honorable John W. Oliver, Chairman of the Board of Election Commissioners, Kansas City, Missouri; another opinion dated June 8, 1954, to Honorable Donald W. Bunker, Executive Secretary, Board of Probation and Parole; a letter dated September 30, 1963, to Mr. W. S. Morris, Chairman of the Board of Election Commissioners, Kansas City, Missouri, and an opinion dated December 6, 1966, to the Board of Election Commissioners, Kansas City, Missouri. We believe the answers to your questions numbered one and four may be found in these opinions.

Honorable William R. Royster

In answer to your second question as to the penalty for a person who votes with a felony conviction, Section 129.470, RSMo, provides in part that any person who shall vote at any election held in pursuance of the laws of this state, or of any city or municipality, knowing that he is not qualified to vote and not entitled to vote, shall be deemed guilty of a felony and upon conviction he shall be punished by imprisonment in the penitentiary not exceeding five years or in a county jail not exceeding one year or by a fine not less than fifty dollars or by both such fine and imprisonment.

In regard to the third question you submitted as to the penalty for a person falsely stating in his application to vote that he has no felony conviction, Section 117.560, RSMo, requires a voter to sign a "VOTERS IDENTIFICATION CERTIFICATE" in which he certifies that he is qualified to vote in that particular election, but this section does not require the voter to be sworn under oath. Section 117.570, RSMo, provides that if the voter is challenged, one of the judges of the election shall administer an oath or affirmation to the voter to answer questions as to his qualifications to vote. Section 117.860, RSMo, provides that any person convicted of feloniously, willfully and corruptly swearing or affirming in taking the oath or affirmation prescribed in such examination shall be guilty of perjury and punished according to the laws of this state for perjury. These statutes apply to the conduct of elections in Kansas City, Missouri. Section 557.020, RSMo, which deals with the punishment assessed for perjury provides in part that any person who shall be convicted of willful and corrupt perjury in any case wherein the punishment is not prescribed by law shall be punished by imprisonment in the penitentiary for a term not exceeding seven years.

We believe this answers the questions you have submitted.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

Enclosures:

Opinion, 1-25-51, to John W. Oliver;  
Opinion, 6-8-54, to Donald W. Bunker;  
Opinion, 12-6-66, to Bd. of Election Commissioners;  
Letter, 9-30-63, to W. S. Morris.

VOTERS:  
REGISTRATION:  
ELECTIONS:  
LEGISLATION:  
RACE, DESIGNATION OF:

House Bill No. 136 (74th General Assembly),  
if enacted, would not invalidate presently  
valid registrations.

OPINION NO. 195

March 16, 1967

Honorable Don L. Manford  
Representative, 18th District  
House of Representatives  
Jefferson City, Missouri



Dear Representative Manford:

Your letter of recent date requested an opinion on the following question:

" . . . If the voter registration affidavit is changed in form, as proposed under HB 136, will this invalidate present registration for voters and require that they again register?"

House Bill 136, 74th General Assembly, in essence, provides for the repealing of Section 117.330, RSMo 1959, and the enactment of one new section, of the same number, in lieu thereof. A reading of House Bill 136, supra, shows that the language of the bill is exactly the same as the statute, with two exceptions.

1. The bill eliminates the necessity for identifying the registering applicant by race in that the "white--colored" classification is deleted.

2. The second difference found in the bill is a rearrangement of sentence structure, lines 50 and 51, using all of the same words as found in the statute and the meaning is unchanged.

The second change noted above has no effect on the question and may be ignored for the purpose of this opinion.

The main question then is whether the deletion of the race identification requirement of Section 117.330, supra, will void previously valid voter registrations. The Constitution of Missouri does not require race identification, and states in Article VIII, Section 5, as follows:



Honorable Don L. Manford

"Registration of voters may be provided for by law."

In construing the registration statutes the Missouri Supreme Court held in *State v. Brown*, 33 S.W. 2d 104, (1.c. 107):

". . . the sole objective of the statute is to determine the individuals who possess those qualifications and make a public record thereof. . . "

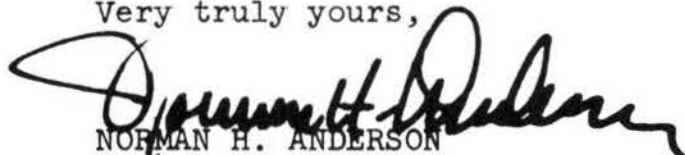
It seems manifestly clear that the deletion of the race identification requirement is a simple change in the form of the registration affidavit and does not in any way affect presently valid registrations.

#### CONCLUSION

It is therefore the opinion of this office that House Bill 136, 74th General Assembly, if enacted, does not contain any language that would invalidate presently valid voter registrations.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, William A. Peterson.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General

OPINION NO. 201  
(Answered by Letter--  
Birnbaum)

March 21, 1967

Honorable Don Witt  
Prosecuting Attorney  
Platte County  
319 Main Street  
Platte City, Missouri



Re: Edgerton Citizen Newspaper  
Opinion No. 201

Dear Mr. Witt:

This is in answer to your request of February 20, 1967, in which you ask whether or not the Edgerton Citizen newspaper qualifies to publish legal notices. In your letter you stated:

"A newspaper termed the Edgerton Citizen began publication on June 1, 1962. The next week thereafter there was no publication, however, the newspaper has continued publishing weekly since that date. The newspaper has now been admitted to the post office as second class matter. It has a list of approximately 300 subscribers who have paid or agreed to pay a stated price for the subscription for a definite period of time. The publisher of the newspaper was not twenty one years of age when he began publication and still is not twenty one. The newspaper was initially mimeographed and has been printed for approximately eight months. During its initial period there were approximately 200 subscribers and the papers were delivered by the most part. \* \* \* "

I direct your attention to the enclosed opinion, numbered 18, addressed to the Honorable J. W. Colley, dated July 2, 1957, for a discussion of the necessary qualifications for a newspaper to be eligible to publish public advertisements and orders of publication required by law to be made and all legal publications affecting the title to real estate.

Honorable Don Witt

There appears from the facts you have given to be a general circulation in the county as defined in State vs. Holman, 275 S.W. 2d 280, 282, which states:

"\* \* \* 'First, that a newspaper of general circulation is not determined by the number of its subscribers, but by the diversity of its subscribers. Second, that, even though a newspaper is of particular interest to a particular class of persons, yet, if it contains news of a general character and interest to the community, although the news may be limited in amount, it qualifies as a newspaper of "general circulation."'"

Having been admitted to the post office as second class matter, the newspaper complies with the first general requirement stated in the opinion, supra.

You have stated that from the second week in June, 1962, there has been a continued weekly publication of this newspaper which complies with the second general qualification of being published regularly and consecutively for a period of three years.

The third general requirement is also being complied with by having a list of approximately 300 subscribers who have paid or agreed to pay a stated price for the subscription for a definite period of time.

There appears no requirement in the statutes as to the age of the publisher. The fact that the publisher is under the age of twenty-one would not affect the eligibility of the newspaper to qualify as a publication for all advertisements and notices required by law and all legal publications affecting the title to real estate.

Based upon the facts you have submitted and the reasoning of the enclosed opinion, we answer your question in the affirmative. The newspaper discussed herein complies with the requirements of Section 493.050, RSMo 1959, and thus qualifies to publish legal notices.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

GLB/jlf  
Enc.--Op. No. 18, Colley, 7/2/57

March 13, 1967



Mr. Herman Julien, Director  
Division of Employment Security  
Box 59  
Jefferson City, Missouri

Dear Mr. Julian:

Recently you submitted an opinion request to this office as follows:

"As you know, the Division of Employment Security is staffed with personnel selected in accordance with the State Merit System Law (Chapter 36, RSMo 1959). The question has arisen whether the salaries paid to individuals working for the Division under so-called emergency appointments are properly charged as an administrative cost of the agency.

"I would, therefore, appreciate your opinion on the following questions:

"What is an emergency within the meaning of the term as used in Section 36.270, RSMo 1959?

"Is the Director of the Division of Employment Security, as the 'appointing authority' as defined in the State Merit System Law, vested with discretion to determine whether an emergency exists so as to justify an 'emergency appointment' under the terms of Section 36.270, RSMo 1959?

Mr. Herman Julien, Director

"Are not emergency appointments subject to at least tacit approval by the head of the Personnel Division of the Department of Business and Administration in view of the provisions of Section 36.330, RSMo 1959?"

You have asked for my opinion as to the authority you have for the making of emergency appointments under Section 36.270, RSMo.

Section 36.270, RSMo 1959, reads as follows:

"Emergency appointments. -- When an emergency makes it necessary to fill a position subject hereto immediately in order to prevent stoppage of public business, or loss, hazard, or serious inconvenience to the public, and it is impossible to fill such a position under any other provision of this chapter, an appointing authority or a properly authorized subordinate employee may appoint any qualified person to such a position without prior approval of the director. Any such person shall be employed only during such an emergency, and any such appointment shall expire automatically thirty working days from the date of appointment. If the emergency continues, the appointment may be extended to sixty days, but no individual may be given more than one such appointment in any twelve-month period. A vacancy of which the appointing authority has had reasonable prior notice, or an employment condition of which he had, or might with due diligence have had, previous knowledge, shall not be considered an emergency under this section. The appointing authority shall report each emergency appointment to the director as soon as possible after date of such appointment and the report shall contain the name of the person appointed, the date of appointment, and the reasons which made the appointment necessary."

Mr. Herman Julien, Director

Section 9.4(c) of the Rules and Regulations of the Personnel Advisory Board, promulgated pursuant to Section 36.070, RSMo 1959, restates such authority in identical language in Section 36.020, RSMo.

As used in Chapter 36, RSMo, the term "appointing authority" is an officer agency under the Merit System Law having power to make appointments and the word Director refers to the Director of the State Merit System Law.

Section 288.220, RSMo Cum. Supp., provides in part that the Division of Employment Security shall be under the control, management and supervision of a Director with authority subject to the provisions of the State Merit System Law (and Chapter 36, RSMo) to employ and prescribe the duties of such employees as may be necessary.

As we view it, the quoted statutory provision vests discretion in the appointing authority (the Director of the Division of Employment Security, in this case) or a properly authorized subordinate employee to make an appointment when an emergency exists. The term "emergency" is not defined, and it would, therefore, appear that it is used in its plain or ordinary and usual sense, which is: "an unforeseen combination of circumstances which calls for immediate action". (Webster's International Dictionary, Second Edition).

While, as noted the State Merit System Law (Chapter 36, RSMo 1959) does not define the term, it does prescribe a limitation upon any determination by the appointing authority that an emergency exists, by saying, in the section quoted:

"\* \* \* A vacancy of which the appointing authority has had reasonable prior notice, or an employment condition of which he had, or might with due diligence have had, previous knowledge, shall not be considered an emergency under this section. \* \* \*"

Subject to this express limitation, it would seem that you, as appointing authority, have the authority to determine when an emergency exists, justifying an appointment under the terms of Section 36.270.

It is unnecessary to determine whether the emergency appointments must be approved by the Personnel Director because if we assume that such approval is necessary the certification by the



Mr. Herman Julien, Director

Personnel Director of the agency payroll, as provided for in Section 36.330, RSMo, which includes such emergency employees, constitutes approval by the Personnel Director of such appointments made by the appointing authority.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

MM:aa

May 29, 1967

OPINION NO. 206  
Answer by Letter-Peterson

Honorable Clinton Almond  
Prosecuting Attorney  
Jefferson County  
Hillsboro, Missouri



Dear Mr. Almond:

Recently you wrote this office and your letter in part asked:

"May the County Clerk of Jefferson County, a County adjoining St. Louis County deputize the City Clerk of Fenton as a Deputy County Clerk for the Registration of Voters?"

Subsequently, Mrs. Eleanor Rehm, County Clerk of Jefferson County, called and explained that Fenton, St. Louis County, Missouri, was much more convenient for some residents of Jefferson County and that she would prefer to establish a voter registration office in Fenton.

In answer to your question we direct your attention to Section 114.090, RSMo Supp. 1965, which in part states:

"The county clerk shall designate additional places of registry in the county, and supervise the registration of voters at such additional places of registry. \* \* \*"

Clearly Section 114.090, supra., would limit registration offices to the subject County and would not permit such offices to be maintained in St. Louis County.

Very truly yours,

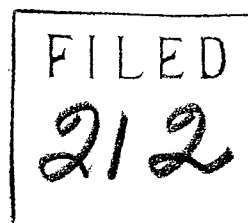
NORMAN H. ANDERSON  
Attorney General

MOTOR VEHICLES: Operation of motor vehicle over city  
INTOXICATED OPERATORS: streets, whether marked or unmarked as  
STATUTORY VIOLATION: WHEN: state highway, by one in an intoxicated  
CITY ORDINANCE ON: condition, a violation of Section 564.440,  
RSMo 1959, defining and fixing punishment  
for operating motor vehicle by intoxicated person, regardless of fact  
said city had ordinance in effect at time of alleged act, prohibit-  
ing operation of motor vehicle in city while one was intoxicated and  
city failed to charge such person with ordinance violation.

OPINION NO. 212

June 27, 1967

Honorable Dan Bollow  
Prosecuting Attorney  
Shelby County  
Shelbyville, Missouri



Dear Mr. Bollow:

This office is in receipt of your request for a legal opinion which reads as follows:

"Please advise me whether or not it is a violation of Section 564.440 to operate a motor vehicle on a city street while intoxicated when that city has a municipal ordinance providing penalties for operating the vehicle while intoxicated, but does not charge the person violating the ordinance with the violation of the ordinance. Does it make any difference whether or not the city street is a marked state highway?"

Section 564.440, RSMo 1959, defines and fixes the range of punishment for the criminal offense of driving a motor vehicle while one is intoxicated, and reads in part as follows:

"No person shall operate a motor vehicle while in an intoxicated condition. Any person who violates the provisions of this section shall be deemed guilty of a misdemeanor on conviction for the first two violations thereof, and a felony on conviction for the third and subsequent violations thereof, and, on conviction thereof, shall be punished as follows:

Honorable Dan Bollow

(1) For the first offense, by a fine not less than one hundred dollars or by imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment;

(2) For the second offense, by confinement in the county jail for a term of not less than fifteen days and not exceeding one year;

(3) For the third and subsequent offenses, by confinement in the county jail for a term of not less than ninety days and not more than one year or by imprisonment by the department of corrections for a term of not less than two years and not exceeding five years;

(4) Evidence of prior convictions shall be heard and determined by the trial court, out of the hearing of the jury prior to the submission of the case to the jury, and the court shall enter its findings thereon \* \* \*".

From the provisions of Section 564.440 supra, it clearly appears that one who operates a motor vehicle over the streets of a city while he is in an intoxicated condition would violate said section, for which he could be prosecuted criminally. If he were tried and convicted, he would be deemed guilty, and punished for a misdemeanor or graded felony, depending on how many previous violations of said section he had been convicted of, as provided by paragraphs 1, 2, 3 of same.

The fact that the particular city through which one operated a motor vehicle while intoxicated did, or did not have an ordinance prohibiting the operation of a motor vehicle within the city while one was intoxicated, and if such city did have such an ordinance in force and did not charge and try the person for a violation of same would be immaterial and of no consequence. Inaction on the part of the city in that instance would not estop the prosecuting attorney of the county in which the city was located from bringing a criminal prosecution under said Section 564.440, and said prosecution could be brought, as noted, if the city did nothing about the ordinance violation, or in the event the city did bring a suit for ordinance violation, the criminal prosecution by the prosecuting attorney could be brought at the same time, or subsequent to the city ordinance violation proceeding.

Honorable Dan Bollow

The essentials of the crime of driving a motor vehicle while one is intoxicated, although contained in the first sentence of Section 564.440 supra, are clearly and fully stated in plain language so there can be no doubt as to what acts constitute the offense, and which we repeat here for emphasis:

"No person shall operate a motor vehicle while in an intoxicated condition".

It is noted that the above quoted definition does not include as one of the essential elements of the crime that the operation of the motor vehicle (by intoxicated operator) shall be over a certain described or otherwise designated public road or highway, or over the streets of a city marked as a state highway. While such descriptions, designation or other identification of the public road, highway or city street over which the motor vehicle was operated could be included in an indictment or information drawn under Section 564.440, without it affecting the legality of the charge, it would be unnecessary and mere surplusage. In the case of State v. Pike, 278 S.W.725, the defense contended that an information charging operation of a motor vehicle while one was intoxicated was fatally defective as not alleging the operation was done over a public highway. The court rejected this construction of the statute, and at 1.c. 726, said:

"It is further complained in the motion in arrest that the information is fatally defective because it does not set forth the defendant was driving a motor vehicle on a public highway. The statute in the paragraph quoted above, does not require as an element of the offense, that the driving should be done on a public highway. Circumstances of aggravation were in the legislative contemplation, as indicated by the wide range of punishment for the offense \* \* \*".

Our answer to the inquiry in the last sentence of your letter is in the negative.

#### CONCLUSION

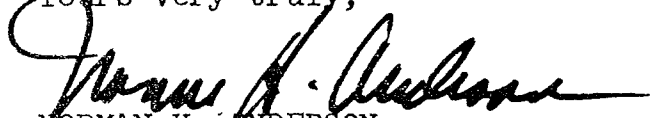
Therefore, it is the opinion of this office that the operation of a motor vehicle over the streets of a city, whether marked or unmarked as a state highway by one while in an intoxicated condition, is a violation of Section 564.440 RSMo 1959, defining and fixing the punishment for operating a motor vehicle by a person while in

Honorable Dan Bollow

an intoxicated condition, regardless of the fact said city had an ordinance in effect at the time of the alleged act prohibiting the operation of a motor vehicle within the city by one while intoxicated and the city failed to charge such person with a violation of the ordinance.

The foregoing opinion which I hereby approve was prepared by my Assistant, Paul N. Chitwood.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Norman H. Anderson", written in a cursive style.

NORMAN H. ANDERSON  
Attorney General



October 17, 1967

OPINION NO. 213  
Answered by Letter (Chitwood)

Mr. Charles O'Halloran  
State Librarian  
State Office Building  
Jefferson City, Missouri 65101



Dear Mr. O'Halloran:

This office is in receipt of your request for a legal opinion, reading in part as follows:

"In 1965, in connection with a demonstration of library service to Miller County, the attached agreement was signed between the Missouri State Library and the Board of Trustees of the Eldon Public Library. You will note in paragraph two of this agreement the statement 'should the Eldon Public Library decide not to enter into cooperative arrangements with the resulting library district, then the books contained in the basic collection will be returned to the Missouri State Library.'

"The resulting library, the Miller County Library, has been created and has entered into contract with the county libraries of Maries, Miller, Osage and Cole, and with the Jefferson City Public Library, to create the Thomas Jefferson Public Library Service.

Mr. Charles O'Halloran

"\* \* \* \* Thus, although the Eldon Library has offered to 'enter into cooperative arrangements with the resulting library district', the resulting district has refused to accept the method of cooperation offered by Eldon, \* \* \*. Thus, the provision in this agreement calling for a cooperative arrangement has not been accomplished and the State Library wishes to consider removing the book collection from the Eldon Public Library under terms of this agreement."

\* \* \* \* \*

"I should like your opinion on the propriety and the legality of the State Library attempting to remove the books. Further, I should like to inquire whether the Attorney General would defend this agency were action brought against it? Last, inasmuch as I am not anxious to forcefully remove the books, will the Attorney General be willing to institute court action to retrieve these books should it become necessary to do so?"

Your inquiries relate to, and are based upon the contract entered into between the Missouri State Library and the Eldon Public Library, and the circumstances involving such contracting parties, consequently, our discussion and answers to the inquiries will be limited to such matters.

In this connection we wish to point out that you have informed us subsequently to the present inquiries that you claim to have power only to loan state owned books to various public libraries, and that you do not have power to convey title of said books to such public libraries. In view of this additional information, the conclusions reached upon your three inquiries will be upon the assumption that title to the books has not been conveyed to the Eldon Public Library but that if the terms of the contract have been followed by that library, it has received a "permanent loan"; and not title to the books.

With reference to the facts here involved, it appears that a contract for a library service demonstration was signed between representatives of the libraries, and that the Missouri State Library was to conduct the demonstration at the Eldon Public Library. We understand the demonstration did begin in 1965, although the contract fails to specify the beginning or ending date for same, and it has ended.

Mr. Charles O'Halloran

In accordance with contractual provisions, particularly paragraph 2, the Missouri State Library did place a basic collection of books in the Eldon Public Library. The number of books in the collection is not given in the opinion request or contract, and the only description given of them in the contract is that they should include both adult and juvenile materials, upon fiction, non-fiction and reference material. Said paragraph 2 of the contract reads as follows:

"The Missouri State Library agrees to provide for the Eldon Public Library a basic collection of books - which would include both adult and juvenile materials and both fiction and non-fiction and some reference materials. Books contained in the basic collection placed in the Eldon Public Library for the period of the Library Systems Demonstration will become a permanent part of the Eldon Public Library's collection at the end of the Demonstration if the Eldon Public Library decides to cooperate with the library district which results from the Demonstration. Should the Eldon Public Library decide not to enter into cooperative arrangements with the resulting library district, then the books contained in the basic collection will be returned to the Missouri State Library."

We quote paragraph 2 in full, as it is the only portion of the contract in question by the parties thereto, and it is the subject of the present inquiries. After the demonstration period had ended, the Miller County Library District was created, and has been referred to as the resulting public library (from the demonstration).

The basic collection of books are still in the possession of the Eldon Public Library, which insists that it has fulfilled provisions of above quoted paragraph 2, entitling it to keep the books, while the Missouri State Library insists the former library has not complied with the contract, in that no "cooperative arrangements", have been accomplished by the Miller County Library and the Eldon Public Library, which is a condition precedent to be performed before the latter district can retain the books.

Neither the contract nor the opinion request define the terms "cooperate" and "cooperative arrangements", although they appear in both. You have informed us these terms were intended to refer to contractual relationship created, or to be created, when the Eldon Public Library contracted with the resulting, or Miller County Library District, and by which contract library services are to be provided to the latter district, in accordance with Section 182.080, RSMo., 1959.

Mr. Charles O'Halloran

It appears that the Eldon Public Library did offer to "enter into cooperative arrangements" with the Miller County Library District as the opinion request informs us:

"\* \* \* \* the resulting district has refused to accept the method of cooperation offered by Eldon, with the result that since February 1, no cooperative arrangements between the libraries exist. Thus, the provision in this agreement calling for a cooperative arrangement has not been accomplished and the State Library wishes to consider removing the book collection from the Eldon Public Library under the terms of this agreement."

It is clear that no "cooperative arrangements" now exist between the two libraries, as the offer made by the Eldon Library to the Miller County Library was rejected, but what was to happen to the books in such an event is not clear. In fact, the above quoted paragraph 2 makes no provision whatsoever for such a contingency.

We cannot agree with your construction of paragraph 2 that since the two libraries were unable to accomplish "cooperative arrangements" between themselves that the books would be returned to the Missouri State Library, as that paragraph certainly does not go that far. The paragraph merely provides that, at the end of the demonstration period, if the Eldon Public Library decided to enter into cooperative arrangements with the resulting library, it could retain the basic collection of books received from the State Library. If it decided not to enter into such cooperative arrangements with the resulting library, the books should be returned to the Missouri State Library.

As a matter of fact the Eldon Public Library did decide in favor of and did offer to enter into "cooperative arrangements" with the resulting library, which the latter would not accept. In the absence of any showing of facts to the contrary, the Eldon Public Library has made at least a prima facie showing of compliance with its part of the contract, and also in the absence of any provision in paragraph 2, or any other portion of the contract that in case the resulting library district should refuse the offer of the Eldon Library to enter into "cooperative arrangements", then the books should be returned by it to the Missouri State Library; the Missouri State Library has no such rights under the contract, and cannot legally remove the books.

Our answer to the first inquiry is that the Missouri State Library is without any legal right under the above mentioned contract to remove the books from the Eldon Public Library.

Mr. Charles O'Halloran

Your second question as to whether or not the Attorney General would defend the Missouri State Library if (legal) action were brought against it is not clear. Such inquiry fails to state what legal action, by whom, and under what circumstances any such action might be brought against the State Library. However, in the first paragraph of page two of the opinion request, you do state the Eldon Public Library has informed you they feel they have a legal and moral right to retain the books, and would seek to prevent their removal, probably by court action.

In the event your second inquiry refers to a possible situation in which the State Library or its agents were to be prevented by court action from removing the books from the Eldon Public Library, would the Attorney General defend the Missouri State Library. We have previously stated the Missouri State Library has no legal right to remove the books under contract, therefore, if the Missouri State Library were to be sued in a court proceeding, this office would not defend the State Library in any such proceeding.

For the same reasons given above, our answer to the third inquiry is that the Attorney General is not in a position to do so, and will not institute any court proceedings against the Eldon Public Library in an effort to regain possession of the basic collection of books from that library, for the Missouri State Library.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

ENC:fb

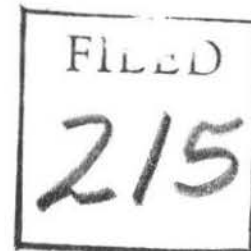


BONDS: Section 64.755, RSMo Cum. Supp. 1965, does not pro-  
PARKS: hibit counties of any class from issuing bonds for  
RECREATION: park purposes even though political subdivisions in  
TAXATION: that county are presently taxing for park purposes  
COUNTIES: at the rate of two mills.

OPINION NO. 215

October 3, 1967

Honorable Gene E. Voigts  
Prosecuting Attorney  
Clay County  
Liberty, Missouri 64068



Dear Mr. Voigts:

Recently you requested an opinion from this office by letter which in part asked:

"Whether funds may be obtained for county park and recreational purposes as stated in Section 64.755, by means of a bond issue when municipalities within the county are currently levying taxes of two mills on a dollar for park purposes, although such levies are pursuant to other specific statutory authorization?"

Your letter further informed us that:

1. Clay County is a second class county;
2. Several political subdivisions within Clay County are currently levying a tax of two mills for park purposes; and,
3. Attorney General's Opinion No. 305, Russell, 11/30/64, appears to hold that Section 64.755, RSMo Cum. Supp. 1965, prohibits a county from levying a tax for park purposes if political subdivisions within that county are presently taxing at the limit for that purpose.

Where the language of a statute is plain and admits all but one meaning, there is no room for construction. Rathjen vs. Re-organized School District R-II of Shelby County, Mo. 284 S.W. 2d 516.



Honorable Gene E. Voigts

Your letter has indicated that Section 64.755 (2), supra, does in fact contain an obvious ambiguity in the language referring to the special tax levy and bond issue. A reading of paragraph 2 of the subject statute does not readily show whether the two mill tax prohibition applies only to a special tax levy or to both that levy and the bond issue. A search of the cases reveals that the courts have not construed Section 64.755, supra, so manifestly the problem is one of construction.

The primary rule of statutory construction is to determine the intent of the legislature. Kirkwood Drug Co. vs. City of Kirkwood, Mo., 387 S.W. 2d 550. In such construction the words should be given their ordinary meaning, considering the whole act and its legislative history. St. Louis Southwestern Ry. Co. vs. Loeb, Mo., 318 S.W. 2d 246. In addition, the title of an act is essentially a part of the act and is itself an active expression of general scope of the bill and may be looked to as an aid in arriving at the legislative intent. In re Tompkins Estate, Mo., 341 S.W. 2d 886.

Senate Bill No. 17, 71st General Assembly\*, approved July 11, 1961 and effective October 13, 1961, contained the original provision of Section 64.755 through Section 64.770, inclusive. Laws, 1961, p. 304. The title to Senate Bill No. 17 read as follows:

"AN ACT to authorize counties, cities, incorporated towns and villages to establish, operate and maintain systems of public recreation and to acquire, establish, equip, develop, conduct and maintain parks, playgrounds and other recreational areas, structures, facilities and services; to authorize the use of general county, city, incorporated town or village funds therefor; to authorize the levy of a special tax and the issuance of bonds therefor; to define the powers of such counties, cities, incorporated towns and villages in connection with such a program; and to provide for the creation of a recreational board or commission, or park and recreational board or commission, the election and terms of the members thereof, and defining powers." (Emphasis added)

The emphasized language in the title indicates that a germane element of the act is a bond authorization, however, an examination

\*Hereinafter referred to as Senate Bill No. 17.

Honorable Gene E. Voigts

of the provisions of Senate Bill No. 17 reveals no language relating to bonds whatsoever. Clearly the title to the act is broader than the act itself. In passing on this question, the Missouri Supreme Court held in State vs. Mo. Pac. Ry. Co., Mo., 147 S.W. 118 and State ex rel. Sekyra vs. Schmall, Mo., 282 S.W. 702, that an act is not void if the title to the act is broader than the act. The contrary is not true. An act is unconstitutional if the scope is not clearly expressed in the title. United Brotherhood of Carpenters vs. Industrial Commission, Mo., 352 S.W. 2d 633, transferred 363 S.W. 2d 82.

In 1963 Senate Bill No. 15, 72nd General Assembly\*, was introduced, passed and approved repealing Section 64.750 and Section 64.755 and enacting two new sections in lieu thereof. Laws, 1963, p. 120. It is in the 1963 amendment that the language now found in Section 64.755 (2) regarding bonds was first expressed. The title to Senate Bill No. 15, read as follows:

"AN ACT to repeal sections 64.750 and 64.755, RSMo 1961 supplement, relating to public recreation systems established and maintained by certain political subdivisions, and to enact in lieu thereof two new sections relating to the same subject." (Emphasis added)

The emphasized language of the above title presents a question to be resolved. It has been previously demonstrated that the title to Senate Bill No. 17 was broader than the act in that the title referred to bonds, but the act contained no such provision. The avowed subject of Senate Bill No. 15, as expressed in the title, is "the same subject" but the same subject did not include bond provisions. The question arises then as to whether or not the 1963 amendments, Senate Bill No. 15, are larger in scope than its title indicates and, therefore, unconstitutional as discussed in the United Brotherhood case, supra. The Missouri Supreme Court has been confronted with a similar question on several occasions. Two cases of significant application are Downey vs. Schroder, Mo., 182 S.W. 2d 320 and State ex rel. Muller Baking Co. vs. Calvird, Mo., 92 S.W. 2d 184. In these cases the Missouri Supreme Court held generally that where the title of an act expressly states that it repeals certain sections and enacts new sections in lieu thereof, the title of the original act becomes the title of the later act and constitutionality of the substituted sections is determined by whether they come within the scope of the original title. "Subject", as used in the Downey case, supra, and Muller Baking Co. case, supra, refers to the subject of

\*Hereinafter referred to as Senate Bill No. 15.

Honorable Gene E. Voigts

the title and not necessarily to the subject of the act. This manifestly is true because the act can be smaller in scope than the title, as held in State vs. Mo. Pac. Ry. Co., supra, but cannot be larger than expressed in the title, Downey vs. Schroder, supra. Therefore, the fact that the original act of 1961, Senate Bill No. 17, did not provide for bonds is not fatal to the 1963 amendment in Senate Bill No. 15 since the title of Senate Bill No. 17 does include such a subject. The 1963 amendment provision for bonds must be read in light of the scope of the original act title. The 1963 amendments are not unconstitutionally broader in scope than the original act title.

The previous discussion was necessary to dispose of any questions that might be raised concerning the validity of Senate Bill No. 15, which enacted the language now found in Sections 64.750 and 64.755, RSMo Cum. Supp. 1965.

In order to answer your specific question, set out on page one heretofore, we now examine Section 64.755, RSMo Cum. Supp. 1965, more closely. A comparison of the original act, Senate Bill No. 17, to Senate Bill No. 15 shows that the present Section 64.755 (2), supra, was changed very little except to insert the bond language. Section 64.755 (2), RSMo Cum. Supp. 1965, reads as follows with the language added by the 1963 amendment in parenthesis:

"2. If sufficient funds cannot be made available from ordinary levies, additional funds may be raised by a special tax levy, (or bond issue within constitutional limits,) but no special tax shall be levied (or any bonds issued,) by any political subdivision unless the rate and purpose of the tax (or bond issue) is submitted to a vote and a two-thirds majority of the qualified voters voting thereon vote therefor. The rate of such special tax levied by (one or more) political subdivision(s) or by cooperating political subdivisions shall not total in the aggregate more than two mills on each one dollar assessed valuation of all real and tangible personal property subject to its or their taxing powers. In the event that any political subdivision is now authorized by statute to levy a tax for this purpose, the combined levies authorized by such statute and by this section shall not exceed the larger levy authorized."

The only language deleted from Senate Bill No. 17, by Senate Bill No. 15, was the following emphasized portion of the last sentence:

Honorable Gene E. Voigts

" \* \* \* No two political subdivisions shall levy this special tax on the same property, and in the event that any political subdivision is now authorized by statute to levy a tax for this purpose, the combined levies authorized by such statute and by this act shall not exceed the larger levy authorized." (Emphasis added)

The reference to bonds contained in the 1963 amendment appears to have been inserted in the original act, generally by the disjunctive word "or" without any clear or implied intent to subject bonds to the same mill limit as that placed on "special tax levies". The only limit placed on bonding is that it must be "within constitutional limits". The constitutional limits for bonding are found expressed in Article VI, Section 26(b), Section 26(c) and Section 26(f), Constitution of Missouri, 1945, which state:

"Section 26(b). Limitation on indebtedness of local governments authorized by popular vote.-- Any county, city, incorporated town or village or other political corporation or subdivision of the state, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted in an amount not to exceed five per cent of the value of taxable tangible property therein as shown by the last completed assessment for state or county purposes, except that a school district by a vote of two-thirds of the qualified electors voting thereon may become indebted in an amount not to exceed ten per cent of the value of such taxable tangible property."

"Section 26(c). Additional indebtedness of counties and cities when authorized by popular vote.--Any county or city, by vote of two-thirds of the qualified electors thereof voting thereon, may incur an additional indebtedness for county or city purposes not to exceed five per centum of the taxable tangible property shown as provided in section 26(b)."

"Section 26(f). Annual tax to pay and retire obligations within twenty years.--Before incurring any indebtedness every county, city, incorporated town or village, school district, or other political corporation or subdivision of the state shall provide for the collection of an annual tax



Honorable Gene E. Voigts

on all taxable tangible property therein sufficient to pay the interest and principal of the indebtedness as they fall due, and to retire the same within twenty years from the date contracted."

A review of the statutes shows that the language of Article VI, Section 26(b) and Section 108.010, RSMo 1959, are comparable. Article VI, Section 26(c) is identical to Section 108.020, RSMo 1959, except that Section 108.020, supra, solely applies to counties. Section 108.030, RSMo 1959, is identical to Article VI, Section 26(f) with the same exception.

The conclusion is inescapable that, with regard to counties, the bond language found in Section 64.755 (2), RSMo Cum. Supp. 1965, must be read in light of and controlled by the constitutional provision of Article VI, Sections 26(b), 26(c) and 26(f), and Sections 108.010, 108.020 and 108.030, RSMo 1959. Any limitation upon bonding authorized by Section 64.755, RSMo Cum. Supp. 1965, is not found specifically set out in that section but is included by reference in the language that states ". . .within constitutional limits. . ."

Opinion No. 305, Russell, 11/30/64, has no application to your questions concerning bond issues. That opinion was not addressed to the bond provision of Section 64.755 (2), supra, and is authority for only those matters therein passed upon.

However, this office has issued an opinion that is applicable. Attached hereto you will find Opinion No. 99, Wright, 2/11/55, which directly passes on the authority of counties to issue bonds for park purposes. While the enclosed opinion deals with third class counties, what is stated therein is applicable to counties of all classes. The fact that Chapter 64, RSMo, was enacted after the opinion was issued does not affect the validity of the holding. The provisions of Section 64.755 (2), supra, relating to county bonding for park purposes is repetitive of the Chapter 108, RSMo, sections previously discussed.

#### CONCLUSION

It is the opinion of this office that Section 64.755, RSMo Cum. Supp. 1965, does not prohibit counties of any class from issuing bonds for park purposes even though political subdivisions in that county are presently taxing for park purposes of the rate of two mills.

Honorable Gene E. Voigts

The foregoing opinion, which I hereby approve, was prepared by my Assistant, William A. Peterson.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

Enc.--Op. No. 99, Wright, 2/11/55



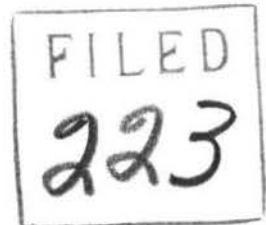
COSMETOLOGY:

A registered cosmetology school cannot require its students to pass a final examination before releasing the students hours, and allowing the students to take their state board examination. The right to a state license is not dependent upon the completion of any school's course but only upon having the qualifications required by Section 329.050, RSMo Supp. 1965, as determined by the state board.

OPINION NO. 223

June 1, 1967

Mrs. Jean Casey  
Executive Secretary  
Missouri State Board of Cosmetology  
1502 West Dunklin  
Jefferson City, Missouri



Dear Mrs. Casey:

This is in answer to your request for an opinion of this office, which request reads as follows:

"Many of the Beauty Schools in Missouri are requiring their students to pass the schools final examination before releasing the students hours, and allowing the student to take their State Board examination. Some students are spending as much as four extra months in school.

I would like to request an official Attorney General's opinion on Section 329.050.

It is my understanding of this section that as long as a student has completed the required time and hours they should be allowed to come to Jefferson City, and pass the examination to the satisfaction of the examining Board."

Section 329.050, RSMo Supp. 1965, reads as follows:

"1. Applicants for examination or registration under this chapter shall possess the following qualifications:

Mrs. Jean Casey

(1) They must be persons of good moral character and have an education equivalent to the completion of the eighth grade;

(2) They shall have served and completed as an apprentice under the supervision of a registered licensed operator the time and studies required by the board which shall be not less than one year for hairdressers and cosmetologists with not less than two thousand four hundred forty hours, and not less than three months for manicurists with not less than three hundred hours; or shall have had the required time in a registered school of at least one thousand two hundred twenty hours' training for the classification of hairdressers and cosmetologists and at least one hundred fifty hours over a period of six weeks for manicurists, except that operators having taken manicuring together with hairdressing and cosmetology shall not be required to serve the extra hours otherwise required to include manicuring; and

(3) They shall have passed an examination to the satisfaction of the examining board.

2. The sufficiency of the qualifications of applicants shall be determined by the board but the board may delegate this authority to its secretary subject to such provisions as the board may adopt."

Section 329.060, RSMo 1959, provides that:

"1. Every person desiring to practice any of the occupations provided for in this chapter shall file with the state board of cosmetology a written application,

Mrs. Jean Casey

under oath, on a form prescribed and supplied by the board, and shall submit proof of the required age, educational qualifications, and of good moral character together with a fee of fifteen dollars made payable to the director of revenue. \* \* \* "

Section 324.090, RSMo 1959, provides that:

"If said state board of cosmetology finds that applicant has submitted the credentials required for admission to the examination and has paid the required fee, said board shall admit such applicant to examination or registration."

Finally, Section 329.110, RSMo 1959, provides for the examination of applicants, which examination "shall be conducted under the rules prescribed by said state board of cosmetology."

The "State Board of Cosmetology," then, has the authority and duty to determine the sufficiency of the qualifications of applicants for a certificate. This authority may be delegated to the secretary of the board, Section 329.050.2, supra, but not to anyone else.

Two qualifications are brought in question by your opinion request. They are passing an examination, and completing the required training in a registered school.

Section 329.040, RSMo 1959, provides for cosmetology schools and sets out the required course of training and also what the training shall consist of. This section reads in part as follows:

" \* \* \* and shall require a course of training not less than one thousand two hundred twenty hours over a period of six consecutive months for the classified occupation of hairdresser and cosmetologist and not less than one hundred and fifty hours for the classified occupation of manicurist, such training to include practical demonstrations, written or oral tests, and practical instruction in sanitation, sterilization and the use of antiseptics, cosmetics and electrical appliances, consistent with the practical and theoretical requirements as applicable to the classified occupations as provided in this chapter; provided, however, that when the classified occupation of manicuring is

Mrs. Jean Casey

taken in conjunction with the classified occupation of hairdresser and cosmetologist as provided in this chapter there need be no additional hours added to said classification for the occupation of manicuring.\* \* \*

Although Section 329.040, supra, provides for written or oral tests by a cosmetology school this is merely authorized as a part of a student's "training." Only the Cosmetology Board has the authority to give an examination as a prerequisite to a certificate.

The requirement of training in a registered school consists of a certain number of hours of training. The sufficiency of this training is to be determined by the board, not the school.

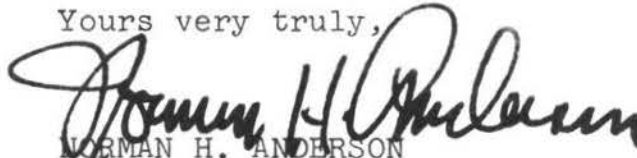
Therefore, it is our opinion that a registered cosmetology school cannot require their students to pass a final examination before releasing the student hours, and allowing the students to take their state board examination. Only the board can determine if the required training time has been completed.

#### CONCLUSION

It is the opinion of this office that a registered cosmetology school cannot require its students to pass a final examination before releasing the students hours, and allowing the students to take their state board examination. The right to a state license is not dependent upon the completion of any school's course, but only upon having the qualifications required by Section 329.050, RSMo Supp. 1965, as determined by the state board.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

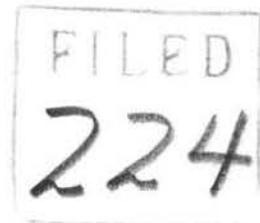
PARK DEPARTMENT:  
HIGHWAY COMMISSION:  
STATE HIGHWAY COMMISSION:  
AIRPORT:  
TAXATION:  
GAS TAX REVENUE:  
MOTOR FUEL TAX:

(1) The State Highway Department does not have authority to use State Highway funds for the purpose of making surveys and tests for the establishment of an airport in Lake Ozark State Park. (2) The State Highway Commission does have authority to expend State Highway funds for the purpose of relocating a highway located in a State Park caused by the location of an airport therein.

OPINION NO. 224

April 26, 1967

Honorable Thomas A. Walsh  
State Representative - District No. 52  
City of St. Louis  
Missouri House of Representatives  
Jefferson City, Missouri



Dear Representative Walsh:

Recently you requested an opinion from this office as follows:

"Does the State Highway Department have the right or authority to use State Highway funds, including gas tax funds, (approximately a total of \$9,486) to make a survey and tests for the establishment of an airport at the Lake of the Ozarks State Park on property of State Park Board?"

Since your inquiry involves the establishment of an airport in the Lake of the Ozarks State Park we have made inquiry from the Highway Department for the purpose of establishing facts respecting the exact nature of the activities of the Highway Department in connection with said airport. According to its Chief Counsel, the Highway Department did not make a survey and test for the purpose of establishing an airport. He stated that the proposed airport runway would intersect and occupy several thousand feet of existing State Highway 134 in Miller County. Therefore a survey and test were made by the Highway Department to determine the appropriate relocation of State Highway 134 together with the location of access roads to the proposed airport terminal facilities. The test included soundings with core drill equipment and surveys by aerial

Honorable Thomas A. Walsh

photographs. These tests and surveys were a necessary and normal procedure for the location of the Highway, the location of the access roads and the development of specifications which will form the basis of the subsequent road construction contracts. We are further informed that copies of the results of these tests and copies of the surveys have been furnished by the Highway Department to the State Park Board. Obviously, the tests and surveys will be useful in the construction of the proposed airport and will eliminate the necessity of duplication of effort by the State Park Board in this regard. The Chief Counsel of the Highway Department fully recognizes that the Highway Department does not have authority to participate in the cost of establishing and constructing the airport, including the making of surveys and tests for that purpose, but, however, states that the surveys and tests in question were made for the primary purpose of relocating the highway and other road construction made necessary by the establishment of the airport.

Returning to a discussion of the question which you originally propounded, Article IV, Section 29, Constitution of Missouri provides that the State Highway Department shall be in charge of the Highway Commission. It further provides in part:

" \* \* \* It shall have authority over and power to locate, relocate, design and maintain all state highways; and authority to construct and reconstruct state highways, subject to limitations and conditions imposed by law as to the manner and means of exercising such authority; and authority to limit access to, from and across state highways where the public interest and safety may require, subject to such limitations and conditions as may be imposed by law."

Article IV, Section 30(a), Constitution of Missouri, provides that a tax upon fuel used for "propelling highway vehicles shall be levied and collected as provided by law" and the net proceeds after deducting the cost of collection to be distributed to the counties, cities and state on a percentage basis.

Section 30(b), Article IV, Constitution of Missouri, provides:

"For the purpose of constructing and maintaining



Honorable Thomas A. Walsh

an adequate system of connected state highways all state revenue derived from highway users as an incident to their use or right to use the highways of the state, including all state license fees and taxes upon motor vehicles, trailers and motor vehicle fuels, and upon, with respect to, or on the privilege of the manufacture, receipt, storage, distribution, sale or use thereof (excepting the sales tax on motor vehicles and trailers, and all property taxes), less the cost (1) of collection thereof, (2) of maintaining the commission, (3) of maintaining the highway department, (4) of any workmen's compensation, (5) of the share of the highway department in any retirement program for state employees as may be provided by law, (6) and of administering and enforcing any state motor vehicle laws or traffic regulations, and less refunds and that portion of the fuel tax revenue to be allocated to counties and to cities, towns and villages under section 30(a) of Article IV of this Constitution, shall be credited to a special fund and stand appropriated without legislative action for the following purposes, and no other:

First, to the payment of the principal and interest on any outstanding state road bonds.

Second, any balance in excess of the amount necessary to meet the payment of the principal and interest of any state road bonds for the next succeeding twelve months shall be credited to the state road fund and shall be expended under the supervision and direction of the commission for the following purposes:

(1) To complete and widen or otherwise improve and maintain the state system of highways heretofore designated and laid out under existing laws;

(2) To reimburse the various counties and other

Honorable Thomas A. Walsh

political subdivisions of the state, except incorporated cities and towns, for money expended by them in the construction or acquisition of roads and bridges now or hereafter taken over by the state as permanent parts of the system of state highways, to the extent of the value to the state of such roads and bridges at the time taken over, not exceeding in any case the amount expended by such counties and subdivisions in the construction or acquisition of such roads and bridges, except that the commission may, in its discretion, repay, or agree to repay, any cash advanced by a county or subdivision to expedite state road construction or improvement;

(3) In the discretion of the commission to locate, relocate, establish, acquire, construct and maintain the following:

(a) supplementary state highways and bridges in each county of the state as hereinafter provided;

(b) state highways and bridges in, to and through state parks, public areas and reservations, and state institutions now or hereafter established, and connect the same with the state highways; and also national, state or local parkways, travelways, tourways, with coordinated facilities;

(c) any tunnel or interstate bridge or part thereof, where necessary to connect the state highways of this state with those of other states;

(d) any highway within the state when necessary to comply with any federal law or requirement which is or shall become a condition to the receipt of federal funds;

(e) any highway in any city or town which is

Honorable Thomas A. Walsh

found necessary as a continuation of any state or federal highway, or any connection therewith, into and through such city or town; and

(f) additional state highways, bridges and tunnels, outside the corporate limits of cities having a population in excess of one hundred fifty thousand, either in the congested traffic areas of the state or where needed to facilitate and expedite the movement of through traffic.

(4) To acquire materials, equipment and buildings necessary for the purposes herein described; and

(5) For such other purposes and contingencies relating and appertaining to the construction and maintenance of such highways and bridges as the commission may deem necessary and proper."

Article IV, Section 33, Constitution of Missouri, provides:

"The commission shall have such authority as may be granted by law to locate, relocate, establish, acquire, construct, maintain and control state public ground facilities for air craft, provided funds therefor, other than the state road funds, are made available."  
(Emphasis supplied)

Attention is called to the fact that the Constitution expressly provides under the above provision that the Commission may be granted authority by the legislature to locate, establish, construct and control public ground facilities for air craft "provided funds therefor, other than state road funds, are made available."

Although Article IV, Section 30(a), Missouri Constitution provides for a tax to be levied upon fuel used for propelling highway motor vehicles, the rate of tax and method of collection is to be determined by the legislature. In compliance with this mandate of levying a tax, the legislature has provided for the rate

Honorable Thomas A. Walsh

of tax and method of collection in Chapter 42 RSMo.

Section 142.020, RSMo Supp. 1965, provides that "in order to provide funds for the construction and maintenance of public highways in this state" a tax at the rate provided in Section 142.025 RSMo Supp. 1965, on each gallon of motor fuel propelling motor vehicles upon public highways is to be collected as provided herein. Under Section 142.025, the tax rate is set at 5 cents per gallon. In Section 142.345 RSMo Supp. 1965, provision is made for the net proceeds of motor fuel tax to be allocated to the counties, cities and state as required by the Constitution.

Section 142.010, RSMo 1959, describes public highways as:

"(9) 'Public highways', every way or place of whatever nature, generally open to the use of the public as a matter of right, for the purposes of vehicular travel, and notwithstanding that the same may be temporarily closed for the purposes of construction, reconstruction, maintenance or repair."

To answer your question, we must first **determine** whether the construction and maintenance of an airport or landing strip for air craft comes within the constitutional purposes for which these particular tax funds may be used. Under Article IV, Section 30(b), the gas tax provided may be used for the purposes as stated therein and for "no other purpose".

The words used in the Constitution are presumed to have been employed in their natural and ordinary meaning and no forced or unnatural construction is to be placed upon them. State ex rel. Randolph County v. Walden, 206 S.W.2d 979, 357 Mo. 167.

Any limitation in the Constitution on the use of funds by the State Highway Commission is binding on the legislature and such limitation is **mandatory**. State ex rel. v. Hitchcock, 241 Mo. 433.

Applying these principles of constitutional construction to the provisions of the Constitution mentioned herein, we find that under Article IV, Section 30(b) gas tax monies stand appropriated for the purposes stated therein and "for no other". This provision expressly enumerates twelve subdivisions in which the purposes

Honorable Thomas A. Walsh

for which these funds may be used are stated. Therein is provided that the funds may be used for the payment of the principal and interest on outstanding bonds and to reimburse counties and political subdivisions which may expend them on roads taken over by the State Highway Commission. All other provisions relate to acquiring, construction and maintaining state highways, bridges and tunnels and for acquiring materials and equipment for these purposes. There is no mention made of the funds being used for airports or for landing fields for air craft. The fact that the framers of the Constitution provided for the Commission to have authority to locate, establish, construct, and control public facilities for air craft "provided funds therefor, other than state road funds, are made available" indicates that it was not intended that the State Highway Commission expend any of the tax funds provided for in Sections 30(a) and 30(b) of Article IV of the Constitution for this purpose. Furthermore, every inference to be gained from the language used in Section 30(b) indicates that these particular funds under this section are to be used only on state highways.

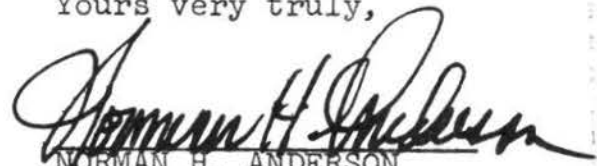
#### CONCLUSION

It is the opinion of this office in answer to the question you ask that the State Highway Commission does not have authority to use the State Highway Funds that are levied and collected under Article IV, Section 30 of the Constitution of Missouri for the purpose of making surveys and tests for the establishment of an airport in the Lake of the Ozarks State Park.

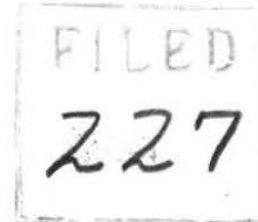
If, however, the facts are as stated by the representatives of the Highway Department then the State Highway Commission does have authority to expend State Highway funds for the purpose of relocating the highway located on the State Park property caused by the location of an airport in the Park and for the construction of access roads to the airport terminal facilities.

The foregoing opinion, which I hereby approve, was prepared by my Assistant Moody Mansur.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

May 16, 1967



Honorable Donald L. Manford  
State Representative  
18th District  
9409 Oakland  
Kansas City, Missouri 64138

Dear Representative Manford:

This letter is in response to your request for an official opinion. Your inquiry is stated in a six-part question as follows:

- "(1) Is there discrimination with the meaning and intent of the law in:
- (a) providing accelerated educational groups in public education?
  - (b) in the assignment of better qualified teachers to the accelerated classes?
  - (c) in providing accelerated groups with specialist mathematics and sciences courses?
  - (d) in providing more and newer text and related materials to the accelerated classes?
  - (e) in the fact that girls predominate the accelerated classes as contrasted with boys of the same age level?
  - (f) in the assignment of discipline cases to the so called low level or non-accelerated class?"



Honorable Donald L. Manford

These questions pertaining to public education present a general situation in indefinite terms, thus we cannot make any specific ruling on your inquiries. However, we shall note hereinafter the general law regarding the operation of public schools which we hope will be of sufficient guidance to you.

Section 171.011, RSMo Supp. 1965, provides as follows:

"The school board of each school district in the state may make all needful rules and regulations for the organization, grading and government in the school district. The rules shall take effect when a copy of the rules, duly signed by order of the board, is deposited with the district clerk. The district clerk shall transmit forthwith a copy of the rules to the teachers employed in the schools. The rules may be amended or repealed in like manner."

Our state courts have held that the course of study is a matter initially within the discretion of the public school board. Roach v. The Board of President and Directors of the St. Louis Public Schools, 77 Mo. 484. If a rule or regulation adopted by a board of education is within the power of the board the courts will not supervise its expediency. King v. Jefferson City School Board, 71 Mo. 628.

So long as their rules and regulations are reasonable and not arbitrary and capricious, the public school board may provide for the organization, grading and government of the schools of the district.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

LCD/ag/df

CHAUFFEURS: An owner of an ambulance service who operates an  
AMBULANCE: ambulance in connection with his business of pro-  
LICENSE: viding ambulance service for compensation is re-  
quired by Section 302.020, RSMo 1959, to have a  
valid chauffeur's license.

OPINION NO. 228

July 20, 1967

Honorable Harold S. Hutchison  
Prosecuting Attorney  
Maries County  
Vienna, Missouri 65582



Dear Mr. Hutchison:

This is in response to your request for an opinion from this office which request states the following:

"My question is whether or not the owner of an ambulance service is required to have a chauffeur's license as prescribed in Section 302.010, R.S.Mo. 1959."

It is our understanding that a charge is made for such ambulance service and that the owner drives the ambulance used in such service.

Section 302.020, RSMo 1959, relating to chauffeurs' licenses, states:

"It shall be unlawful for any person to:

(1) Drive as a chauffeur any vehicle upon any highway in this state unless such person has a valid license as a chauffeur under the provisions of this chapter, or to\* \* \*

Chauffeur is defined in Section 302.010, RSMo Cum. Supp. 1965, as follows:

"When used in this chapter the following words and phrases mean:

(1) 'Chauffeur', an operator who operates a motor vehicle in the transportation of persons or property, and who receives compensation for such services in wages, salary, commission or fare; or who as owner or employee operates a

Honorable Harold S. Hutchison

motor vehicle carrying passengers or property for hire; or who regularly operates a commercial motor vehicle of another person in the course of or as an incident to his employment, but whose principal occupation is not the operating of such motor vehicle; \* \* \* "

Section 302.010, subparagraph (1), supra, is composed of three separate definitions for determining who is a chauffeur. The second definition "or who as owner or employee operates a motor vehicle carrying passengers or property for hire" is applicable to your question.

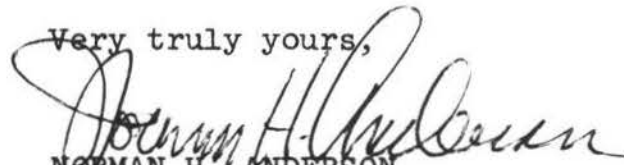
"The term 'operation for hire' has a well-known and definite meaning in the jurisprudence of this country. This term means in law, in commercial usage, and in ordinary parlance, the transportation of persons or property for compensation . . . " Brown vs. National Motor Fleets, Inc., Ala., 164 S. 2d 489, 490.

#### CONCLUSION

Therefore, it is the opinion of this office that an owner of an ambulance service who operates an ambulance in connection with his business of providing ambulance service for compensation is required by Section 302.020, RSMo 1959, to have a valid chauffeur's license.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Gerald L. Birnbaum.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

OPINION NO. 232

April 25, 1967

Honorable James Millan  
Prosecuting Attorney of Pike County  
Bowling Green, Missouri



Dear Mr. Millan:

This is in answer to your letter of recent date requesting an official opinion of this office concerning Section 85.561 RSMo, 1959.

Such Section appears to be one relating to the power of city police officers to make arrests for violations of city ordinances. In view of this fact, it appears there would not be any official duty on the part of the prosecuting attorney relating to such power of city police officers.

Under provisions of Section 27.040, this office is authorized to render official opinions to prosecuting attorneys concerning their official duties only. We are therefore, unable to render you an official opinion on this matter.

We have searched our files and do not find any former opinions on this precise question. However, we do suggest that a study of two cases that might be helpful in this matter. Such cases are Advance v. Maryland Casualty Company, 302 SW2d 28 and Hacker v. Potosi 340 SW2d 166. Such cases arose under Section 85.610 RSMo, 1959, a section applicable to fourth class cities. However, it appears that the cases do contain principles of law which should be helpful in determining the authority of police officers in third class cities under Section 85.561.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

SCHOOLS:  
SCHOOL BOARD:  
SCHOOL TAX:  
SCHOOL DISTRICT:  
TUITION:

A school board may set a tuition rate which is not the actual per pupil cost except as expressly limited by statute. A parent may send his children to a public school in the district in which he pays a school tax. A school board does not have the right to refuse admittance to the child of a school taxpayer in that district.

December 12, 1967

OPINION NO. 235 - 67



Honorable Melvin D. Benitz  
Prosecuting Attorney  
County of Callaway  
State of Missouri  
Fulton, Missouri

Dear Mr. Benitz:

This official opinion is in response to your letter, April 19, 1967, in which you ask what limitations a school district has in setting tuition rates, whether or not a school board may refuse admittance to the child of a non-resident taxpayer, and if they may not refuse admittance to this child under Section 167.151(3), RSMo Supp. 1965, whether or not they may refuse to admit him under Section 167.131(2), RSMo Supp. 1965.

Your first question is:

"Under 167.151, RSMo 1959 Supp., may a district set a tuition rate that is unrelated to actual per pupil cost, provided that it also refuses to admit any students under Section 167.131 RSMo 1959 Supp.?"

Section 167.151(1), RSMo Supp. 1965, clearly states that a school board in its discretion may admit pupils not entitled to free instruction "and prescribe the tuition fee to be paid by them, except as provided in Sections 167.121 and 167.131." The express limitations are as follows:

(1) Section 167.121, RSMo Supp. 1965: provides that the county superintendent may assign a pupil to a school in another district which is more accessible and that "The tuition shall not exceed the pro rata cost of instruction."

Honorable Melvin D. Benitz

(2) Section 167.131, RSMo Supp. 1965: provides that a district without a high school shall pay the tuition of its residents attending high school in another district, and provides the rate of tuition to be charged.

If a pupil is covered by either of the above sections, then the school must charge the tuition required by statute, and no more. These are the only express limitations on the rate of tuition. In other situations, the board may charge a tuition which is not the actual per pupil cost and is limited only by standards of reasonableness.

Your second question is:

"Does the word 'may' in Paragraph 3 of 167.151 RSMo Supp., permit a school board to refuse admittance to a child of a non-resident taxpayer?"

Section 167.151, RSMo Supp. 1965, provides in paragraph (3) that "Any person who pays a school tax in any other district than that in which he resides may send his children to any public school in the district in which the tax is paid and receive as a credit on the amount charged for tuition the amount of the school tax paid to the district."

The word "may" means that the parents have the discretion to send their children to any public school in the district in which the tax is paid. Obviously, "may" cannot be read as "shall" in this sentence.

The problem, however, is whether or not the school district has the discretion to refuse these pupils. Paragraph (1) of Section 167.151, RSMo Supp. 1965, states that, "The school board of any district, in its discretion, may admit to the school pupils not entitled to free instruction and prescribe the tuition fee to be paid by them, except as provided in sections 167.121 and 167.131."

Section 167.151(3) provides for a credit on the amount charged for tuition, so these pupils are not entitled to free instruction. The language of this statute emphasizes the board's power to admit by saying that the board has the discretion to "admit" rather than saying the discretion to "refuse to admit". It seems that the intent of this section was intended to broaden the powers of admission, and paragraph (1) does not limit paragraph (3). A parent under paragraph (3) "may send his children to any public school in the district in which the tax is paid" and the school board of that district does not have the discretion to refuse them admittance.



Honorable Melvin D. Benitz

The sources of Section 167.151, RSMo Supp. 1965, were Sections 163.010 and 165.393, RSMo 1959. Both these earlier statutes used the language "shall be entitled" where "may" is used in the present statute. Section 163.010 enumerated certain powers of the board of education but provided that, "any person paying a school tax in any other district than that in which he resides shall be entitled to send his or her children to school in the district in which such tax is paid and receive credit on the amount charged for tuition to the extent of such school tax."

Section 165.393 also enumerated powers of the board and then provided that, "any person not a resident of said school district and who pays a school tax therein, shall be entitled to send his or her children to any public school in said district and receive as a credit on the amount charged for tuition the amount of such school tax so paid to said district." These provisions limited the school board's power to exercise its discretion to refuse such pupils. The language of these two statutes was clear; a parent paying taxes in a school district has a right to send his child to school there. These statutes were consolidated into Section 167.151, RSMo Supp. 1965, and there is no evidence that the legislature intended to change the essence of these provisions by changing "shall be entitled to" to "may". This simplification of language does not change the meaning of the provision.

A basic rule of statutory construction is that we are to take words in their common meaning, Lansdown v. Faris, Mo., 66 F. 2d 939, 942. "May" in its ordinary meaning is permissive or power giving and means "shall be entitled to."

"Taken in its natural and ordinary sense, the word 'may' does not import a command, but merely signifies permission, ability, or possibility, and generally it denotes that the action spoken of is optional with the person concerned, or rests in the discretion of the court or body to which permission is given. And the word always retains its primary meaning, unless a different construction is necessary to give effect to the clear purpose and intention of the Legislature, to make the statute accord with settled public policy, or to save the rights of parties in interest." People v. DeRenna, 2 N.Y.S. 2d 694, 700, 701; 166 Misc. 582.

Here "shall be entitled to" is the construction which gives "may" its primary meaning and effects the purpose of the legislature which is to let a person paying school taxes, directly benefit from his tax money. Whether or not a person is a bona fide taxpayer must be determined on the facts of each case.

Honorable Melvin D. Benitz

Your third question is:

"If the answer to (2) above is 'no', can a non-resident, who is a resident of a district that has no high school, contravene the school board's right to refuse admittance to a non-resident high school student under 167.131 RSMo Supp, by buying a small parcel of real or personal property in the district, and having it placed on the tax books, and then invoke the provision of 167.151 RSMo 1959 Supp.?"

A different problem is presented when a resident of a district without a high school buys real property in a district with a high school. His buying personal property would not make him a taxpayer in that district because all tangible personal property is assessed in the school district in which the taxpayer resides. (Section 164.041, RSMo Supp. 1965).

First, the school board could not refuse admittance to a non-resident high school student if his parent pays a school tax in that district, (Section 167.150, RSMo Supp. 1965). However, if a parent purchases or leases real property with a very small or nominal value and pays a minimal tax, his status as a bona fide taxpayer is questionable. Whether or not a person is a bona fide taxpayer must be determined on the facts of each case.

Section 167.131, RSMo Supp. 1965, also applies. This section provides a system of tuition payments by a school board in a district without a high school to an approved high school in another district which a resident of the first district attends.

Paragraph (1) states that the school board shall pay the tuition, paragraph (2) regulates the rate of tuition to be charged per pupil; how disputes are to be resolved and finally says that, "Subject to the limitations of this section, each pupil shall be free to attend the school of his or her choice; but no school shall be required to admit any pupil." This sentence does not apply to children of school taxpayers covered by Section 167.151, RSMo Supp. 1965. That section expressly provides that children of school tax payers may attend school in the district in which the tax is paid. The board may not refuse these pupils because they are also pupils from a district without a high school and the board's rate of tuition for these pupils is regulated by Section 167.131, RSMo Supp. 1965.

Honorable Melvin D. Benitz

CONCLUSION

It is the opinion of this office that a school district may set a tuition rate which is not the actual per pupil cost unless the pupil has been assigned to a more accessible district by the County Superintendent of Schools or the pupil resides in a district without a high school. Sections 167.151, 167.121, 167.131, RSMo Supp. 1965.

A school board may not refuse admittance to the child of a person who pays school taxes in the district. The word "may" in paragraph (3) of Section 167.151, RSMo Supp. 1965, gives the parents discretion to send their children to a public school in the district in which they pay school taxes, and does not give the school board discretion to refuse to admit them.

Section 167.131, RSMo Supp. 1965 does not give a school board the right to refuse admittance to the child of a person paying a school tax in that district.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Deann Duff.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

August 23, 1967



Honorable George W. Parker  
State Representative - District 120  
507 E. Rollins  
Columbia, Missouri

Dear Mr. Parker:

This is in response to your request for opinions as follows:

1. Must a highway patrolman have reasonable grounds or suspect some law violation before he can stop a person on the road?
2. Could you provide an outline of guidance on this subject, for example, that would be used to instruct patrolmen?

A second topic--when a minor is apprehended for drinking alcoholic beverage, is the fact that he has been drinking consideration sufficient evidence of illegal possession? If not, why?

If in No. 1 you mean before an arrest and search can be made, the answer is yes, see *State v. Brown*, 291 S.W. 2d 615, *State v. Loftis* 316 Mo. 878, 292 S.W. 29.

With respect to No. 2 such an outline was prepared by Professor John Scurlock of the University of Missouri at Kansas City Law School and published in the *University of Kansas City Law Review*, Volume XXIX, p. 117. It is already in use by many law enforcement agencies throughout the state. Professor Scurlock has brought the treatise up to date this summer so as to reflect recent developments in the field and he should be contacted if copies are desired.

Your third question is answered in the attached Opinion, No. 100-1967.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

Attachment

Opinion no. 100-1967

COURTS:  
MAGISTRATE COURT:  
MOTOR VEHICLES:  
DRIVERS LICENSE:

A non-resident defendant convicted of any charge for which Chapter 302, RSMo as amended, makes mandatory the suspension or revocation of his privilege to operate a motor vehicle in this State must surrender

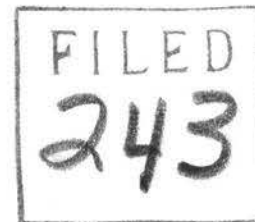
his license to the Court pursuant to Section 302.225, RSMo Sup. 1965 and the Court must, within ten days thereafter, forward the license, together with the record of conviction, to the Director of Revenue.

The Director should note on the back of the license that the privilege of the non-resident to drive a motor vehicle on the highways of this State is suspended for the required length of time or revoked and return the license as soon as possible to the licensee. The Director also should forward a certified copy of the record of conviction to the motor vehicle administrator in the state wherein the person so convicted is a resident. Section 302.150, RSMo.

OPINION NO. 243

November 2, 1967

Honorable Maurice B. Graham  
Prosecuting Attorney  
Madison County  
148 East Main Street  
Fredericktown, Missouri



Dear Mr. Graham:

This is in answer to your request for an opinion of this office as to whether a non-resident defendant who has pleaded guilty to a charge of driving a motor vehicle while in an intoxicated condition in violation of Section 564.440, RSMo Sup. 1965, should be required to surrender his license to the judge to be forwarded to the Director of Revenue.

Paragraph 2 of Section 302.225, RSMo Sup. 1965, reads as follows:

"2. Whenever any person is convicted of any offense or series of offenses for which this chapter makes mandatory the suspension or revocation of the operator's or chauffeur's license of such person by the director, the circuit court or magistrate court in which such conviction is had shall require the surrender to it of all operator's and chauffeur's licenses, then held by the person so convicted,



Honorable Maurice B. Graham

and the court shall within ten days thereafter forward the same, together with a record of the conviction, to the director."

Section 302.302-1(7), RSMo Sup. 1965, provides for an assessment of 12 points for a conviction of operating a motor vehicle while in an intoxicated condition in violation of state law. Such an assessment requires the revocation of the person's operating privileges by the Director of Revenue. Section 302.304, RSMo Sup. 1965. Thus, when a person licensed under the laws of this state is convicted of driving while intoxicated in violation of Section 564.440, RSMo Sup., as amended, the convicting court is required to **pick** up his license and forward it to the Director of Revenue within ten days thereafter.

Of course, the State of Missouri may not suspend or revoke a license to drive issued by another state. However, the privilege of driving a motor vehicle on the highways of this state given to non-residents is subject to suspension and revocation by the Director of Revenue in like manner and for like cause as is the license of residents licensed under the laws of this state. Section 302.150, RSMo 1959. Thus it would appear that the procedure provided by Section 302.225, for suspending or revoking the license of a resident, would apply, "in like manner" to the suspension or revocation of the privilege of driving given a non-resident and, the non-resident would be required to surrender his license thereunder to be forwarded to the Director of Revenue.

If this procedure were not followed, the authority of the Director to suspend or revoke the driving privileges of non-residents would be incapable of enforcement and in most cases meaningless. Under the present law, the courts are not authorized to suspend or revoke a person's driver's license; this may be done only by the Director of Revenue. If the courts were not allowed to pick up the license of a non-resident convicted of an offense which makes mandatory the suspension or revocation of his driving privilege, there would be no way that notice of the suspension or revocation could be placed on the license or otherwise brought to the attention of the police or the court if he continued to drive.

It is presumed that the legislature does not intend to enact an absurd law incapable of being enforced. City of Joplin v. Joplin Water Works, Mo.Sup., 386 S.W.2d 369; Memmel v. Thomas, 238 Mo.App. 403, 181 S.W.2d 168. Unless some notice of the revocation of the driving privilege of a non-resident were placed upon his license, the revocation would as a practical matter, be meaningless.

As we previously stated, the State of Missouri may not suspend or revoke a driver's license issued by another state, but only the privilege of operating a motor vehicle in this state. Allowing the convicting court to pick up the license of a non-resident and to



Honorable Maurice B. Graham

forward it to the Director of Revenue is justified only to effectuate the suspension or revocation of his privilege. The director must forward a certified copy of the record of conviction of the non-resident to the motor vehicle administrator in the state wherein the person so convicted is a resident. Section 302.150, RSMo. However, he has no authority to do anything with the person's license other than to note thereon the suspension or revocation of his privilege to drive in Missouri, and the director should then return the license to the non-resident as soon as possible.

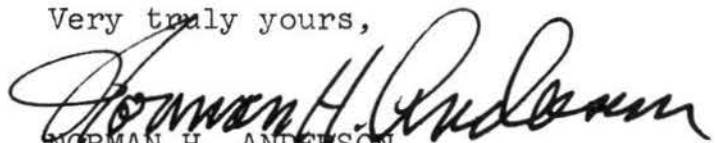
#### CONCLUSION

A non-resident defendant convicted of any charge for which Chapter 302, RSMo as amended, makes mandatory the suspension or revocation of his privilege to operate a motor vehicle in this State must surrender his license to the Court pursuant to Section 302.225, RSMo Sup. 1965; and the Court must, within ten days thereafter, forward the license, together with the record of conviction, to the Director of Revenue.

The Director should note on the back of the license that the privilege of the non-resident to drive a motor vehicle on the highways of this State is suspended for the required length of time, or revoked and return the license as soon as possible to the licensee. The Director also should forward a certified copy of the record of conviction to the motor vehicle administrator in the state wherein the person so convicted is a resident. Section 302.150, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

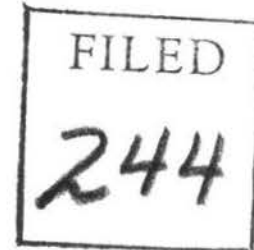
PARK BOARD:  
AIRPORTS:  
PARKS:

The State Park Board has implied power and authority to construct an airport on State Park Land.

OPINION NO. 244

July 6, 1967

Honorable Thomas A. Walsh  
State Representative - 52nd District  
City of St. Louis  
Capitol Building  
Jefferson City, Missouri



Dear Representative Walsh:

Recently you requested an opinion from this office as follows:

"Does the State Park Board have authority to construct an airport in a State Park."

It is our understanding that your inquiry concerns the authority of the State Park Board to construct an airport on the Lake Ozarks State Park.

Section 253.040 (1) RSMo. Supp. 1965, which sets forth the powers of the State Park Board provides as follows:

"1. The board is hereby authorized to accept or acquire by purchase, lease, donation, agreement or eminent domain, any lands, or rights in lands, sites, objects or facilities which in its opinion should be held, preserved, improved and maintained for park or parkway purposes. The board is authorized to improve, maintain, operate and regulate any such lands, sites, objects or facilities when such action would promote the park program and the general welfare. \* \* \*"

Section 253.090 (1) RSMo. Supp. 1965, provides as follows:

"1. The board may construct, establish and operate suitable public services, privileges, conveniences and facilities on any land, site or object under its jurisdiction and control, and may charge and collect reasonable fees for the use of same. The board may charge reasonable fees for supplying services on park areas."

It is apparent from a reading of the foregoing statutes that they do not expressly authorize the construction, or operation of airports by the Park Board. The problem remains however, whether the construction of an airport is authorized by implication from the language used in the statutes.

It appears that if an airport is a facility which is properly included within the phrase "park purposes," the State Board does have under such Section the implied power to construct an airport in a State Park.

The courts have been rather liberal in determining the facilities that may be constructed and maintained within parks.

In the Case of City of Wichita vs. Clapp, 263 Pac. 12, a Case which held that an airport may be located in a municipal park, the Supreme Court of Kansas pointed out the wide range of facilities which have been held to be properly installed in parks stating, l.c. 13:

" \* \* \* Under various authorities, the expression 'park purposes' has been held to include a race track, a tourist camp, bridle trails, boating, bathing, refreshment and lunch stands, providing bathing suits, towels and rooms for bathers, dressing pavilion, waiting room for street cars, refreshment and shelter room for the public, grand stand, ball games, baseball diamond, race meets, tennis courts, croquet grounds, children's playgrounds, hotels, restaurants, museums, art galleries, zoological and botanical gardens, conservatories, and many other recreational and educational facilities. \* \* \* "

In the Case of Schmoldt vs. City of Oklahoma City, 291 Pac. 119, another case holding that an airport could be constructed as part of a park, the Supreme Court of Oklahoma said, l.c. 120:

"It is a matter of public knowledge that the erection of museums, art galleries, zoological and botanical gardens, conservatories, auditoriums, veterans' memorial halls, tennis courts, swimming pools, and the like in public parks, is common, and that their establishment has not been regarded as a diversion from legitimate park uses, but, on the contrary, such buildings have been generally recognized as ancillary to the complete enjoyment by the public of the property set apart for their benefit. \* \* \* "

Concerning the question of the authority of a city to construct and maintain an airport as part of a city park, the Supreme Court of Kansas in the Case of City of Wichita vs. Clapp, supra said l.c. 15:

"The airway is essentially a free highway. As such it is open to all qualified aircraft. It is rightly, therefore, a federal undertaking to lay out and equip airways. The maintenance of airports, however, comes legitimately within the scope of the municipality in much the same manner as docks and harbor facilities for marine shipping. Airports are said to be as important to commerce as are terminals to railroads or harbors to navigation. Municipalities are studying local conditions and commercial organizations are pressing the importance of establishing terminal airports and of providing proper lighting for landing fields, and facilities such as hangars, garages, and repair shops. The possession of the airport by the modern city is essential if it desires opportunities for increased prosperity to be secured through air commerce. Lands susceptible of improvement, as parks, playgrounds, or general recreational purposes, may be utilized and developed around the modern airport so that the municipality may bring to itself not only the advantages of air commerce but afford its citizens those other inestimable advantages of improved beautification and health-giving opportunities. \* \* \* In any event, we are of opinion that the airport or landing field is as properly included within park purposes as tourist camps and other named recreational objects, and that the board of park commissioners of Wichita is authorized and empowered, under the provisions of chapter 117 of the Laws of 1927, to proceed to purchase or condemn the lands in question for the purposes stated."

The Supreme Court of Oklahoma in the Case of Schmoldt vs. City of Oklahoma City, supra, said l.c. 121:

"Under the authorities from our sister states passing upon this question, it seems to be settled by the courts of last resort, in the states that have passed upon this proposition, that a city may use a portion of its park as an airport or aviation field.

\* \* \* \* \*

"The only question for us to determine is whether or not the city of Oklahoma City has a right to use any portion of the funds, derived from the sale of the bonds voted to purchase or maintain a park, in constructing a landing field for airplanes, and as said before, if a city may use a portion of such funds for building sidewalks around, walks and driveways through, its park for the amusement of the public, we see no good reason for holding the city cannot expend a part of its funds in maintaining an airport for the pleasure and amusement of the public. \* \* \* "

In the Case of Aquamsi Land Company vs. City of Cape Girardeau, 142 SW2d 332, the Supreme Court of Missouri upheld as proper construction by the City on municipal park property of baseball and football fields, a large arena adapted to public speaking, theatrical and musical entertainment, dances and indoor athletics, and containing a hall to accommodate banquets and exhibits and a track for horse racing because such facilities constituted proper park usage. In such Case the Court had the following to say concerning the Case of Wichita vs. Clapp, supra, l.c. 336:

" \* \* \* Also City of Wichita v. Clapp, 125 Kan. 100, 263 P. 12, 63 A.L.R. 478, ruled the devotion of a reasonable portion of a public park to an aviation field for recreation and other attendant purposes, came within the legitimate and proper use for which public parks are created. The reasoning of these cases, which makes the outdoor recreative nature of the proposed use the determinative factor, would apply to a track and facilities for horse racing. \* \* \*"

In the Aquamsi Case, the Court pointed out that a liberal construction of the use to which park property may be put, is adopted by the Courts when there is no restriction on the use of park land in the instrument granting such real property. The Court said l.c. 335:

" \* \* \* Where the land has been dedicated to public use as a park by private grant with conditions annexed, the conditions must be complied with; but where purchased or condemned by the municipality greater liberality of construction is allowed.  
\* \* \* "

In the Case of School District of Kansas City vs. Kansas City, 382 SW2d 688, the Supreme Court held that the construction and operation of a public library on land owned in fee simple by Kansas City as part of its park system is a proper park usage.

The park land herein involved was obtained by the State of Missouri from the United States. The quitclaim deed conveying the property to the State of Missouri provides that such property can be used only for public park recreational and conservational purposes. However, the State has obtained from the United States Department of Interior a written declaration that the construction of an airport on the State Park Land quitclaimed by the United States to the State of Missouri, does not violate the conditions of the deed but is in compliance with such conditions.

The Kansas City Court of Appeals in the Case of Kennedy vs. City of Nevada, 281 SW 56; 222 Mo. App. 459, held that a municipal tourist camp in the City of Nevada was not a public park. However,



the tourist camp involved in that Case was for the exclusive use of transient non-residents, and the Court said that a park is a place open to the public and that exclusion of any class of a community from a facility is repugnant to the idea of a park. We do not believe that such Case is any authority for holding that the construction and maintenance of an airport, the use of which is not restricted to non-residents is not a park purpose.

CONCLUSION

It is the opinion of this office that the State Park Board has implied power and authority to construct an airport on State Park Land.

This opinion of which I hereby approve was prepared by my assistant, Mr. C. B. Burns, Jr.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General



May 10, 1967



Honorable Harry L. Porter  
Prosecuting Attorney  
Linn County  
Marceline, Missouri 64658

Dear Mr. Porter:

This will acknowledge receipt of your letter dated April 24, 1967, to the Attorney General requesting an opinion concerning the liability of an auctioneer for sales tax. I wish to advise you that it is the position of the Department of Revenue and the position of this office that an auctioneer is liable to sales tax. This is provided for in Rules and Regulations of the Department of Revenue, Rule 28, which provides as follows:

"Every factor, auctioneer, broker, or agent operating a community sale or auction sale or otherwise selling tangible personal property for an undisclosed principal shall be deemed a retailer as defined in the sales/use law and the receipts derived from such sales are subject to the tax. The person, agency, firm or corporation managing, conducting or acting as auctioneer or otherwise making such sales are deemed to be the seller and should be registered with the Department of Revenue and collect and remit the tax.

In instances where a sale by such factor, auctioneer, broker, or agent is made for a known or disclosed principal, then such principal shall be required to collect and remit the tax thereon providing the items sold by undisclosed principal are items regularly sold in his type of business."

Very truly yours,

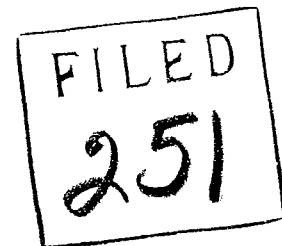
NORMAN H. ANDERSON  
Attorney General

ANATOMICAL BOARD: Under the provisions of Section 194.190, RSMo  
DISPOSITION OF DEAD Cum. Supp. 1965, only a person 18 years or  
HUMAN BODIES: older of sound mind may consent by writing as  
GIFTS OF HUMAN BODIES: provided therein to donate his body or parts  
DEAD BODIES: thereof to a named institution. A college,  
university, licensed hospital or the State  
Anatomical Board is not exempted from tort liability by Section  
194.190 (6) if such institution removes or uses all or any part of  
a body for scientific, educational or therapeutic purposes without  
the written consent of the decedent except for cases where the con-  
sent of the decedent had been revoked but the institution acted in  
good faith without actual knowledge of the revocation.

OPINION NO. 251

September 1, 1967

Dr. M. D. Overholser  
Missouri State Anatomical Board  
Department of Anatomy  
University of Missouri Medical Center  
Columbia, Missouri



Dear Dr. Overholser:

This is in response to your request for an opinion from this  
office which request states:

"The Missouri State Anatomical Board requests  
your opinion regarding questions we have con-  
cerning Section 6 of House Bill No. 365 passed  
by the 73rd General Assembly, entitled, An Act  
Relating to gifts and acceptance of tissues and  
dead bodies for scientific, educational or  
therapeutic use.

Section 6 of the above Bill reads as follows:

"No cause of action in tort shall accrue to  
any person out of the removal or use of all  
or any part of the body for any such purpose,  
if the consent of decedent was given, or con-  
sent was given by a person upon whom devolves  
by law the right to control the disposition  
of the remains of a deceased person as defined  
herein, notwithstanding the invalidity of any  
such consent for any reason, provided, the per-  
son relying thereon:

Dr. M. D. Overholser

"(1) Acted in good faith;  
(2) Had no actual knowledge of the  
revocation of such consent.

"Our questions are these: (1) Can a relative of a deceased person make a gift of the body to an institution as named in Section 3 when there is no previous written statement signed by the deceased stating that this is his wish?

(2) Can a relative of a deceased person make a gift of the body to an institution as named in Section 3 when there is no previous written statement signed by the deceased stating that this is his wish but the relative states that the deceased made a previous oral request to him that this be done?

(3) If the answer should be yes to either or both of the above questions which relatives would have the power to make such a gift of the body of the deceased?"

House Bill No. 365 passed by the General Assembly in 1965, mentioned in your opinion request, appears now as Section 194.190, RSMo. Cum. Supp. 1965. This section pertains to gifts and bequests of deceased's remains to certain institutions and states generally that persons 18 years or older of sound mind may by writing witnessed by two persons of legal age make a gift of his body or any part thereof to any college, university, licensed hospital or the State Anatomical Board. A bequest by will shall be effective immediately upon death of the donor. Without the consent of the coroner, when there is reason to believe an inquest will be held on the body, no person shall give authority or act on such authority relating to the gift or bequest of a deceased's remains to the above named institutions. Subsection 6 of Section 194.190, supra, mentioned in the opinion request, is quoted in full as follows:

"6. No cause of action in tort shall accrue to any person out of the removal or use of all or any part of the body for any such purpose, if the consent of decedent was given, or consent was given by a person upon whom devolves by law the right to control the disposition of the remains of a deceased person as defined herein, notwithstanding the invalidity of any such consent for any reason; provided, the person relying thereon: (1) Acted in good faith; (2) Had no actual knowledge of the revocation of such consent."

Dr. M. D. Overholser

Question 1, asking can a relative make a gift of a deceased person's remains when there is no previous written authority, is answered in the negative.

It was necessary in determining your question to consider the history of House Bill 365. At the time such Bill was introduced on February 9, 1965, and after being perfected on April 1, 1965, there appears in section 2 the provision that any person upon whom devolves by law the right to control disposition of a deceased person may donate in writing to the institutions listed in the Bill all or any part of the deceased person's body unless he had knowledge that the decedent had left instruction for disposition of the body inconsistent therewith and section 3 contained a list of those persons upon whom devolved by law the right to control the disposition of the remains of a deceased person and to donate tissue therefrom. You will note that in House Bill 365, as truly agreed to and finally passed, these sections were deleted. It must be reasoned that the legislature intended by deleting subsections 2 and 3 thereof to eliminate any other person or persons than the deceased with any authority to make a gift of his remains to the named institutions.

Section 6 of the truly agreed to and finally passed House Bill is similar to section 8 of the perfected House Bill. In those sections there appears the following:

" \* \* \* if the consent of decedent was given,  
or consent was given by a person upon whom  
devolves by law the right to control the dis-  
position of the remains of a deceased person  
as defined herein, notwithstanding the in-  
validity of any such consent for any reason,  
provided, the person relying thereon:

- (1) Acted in good faith;
- (2) Had no actual knowledge of the  
revocation of such consent."

The underlined portion, supra, was necessary in the Bill as introduced and perfected as it made direct reference to the list of persons in section 3 thereof. However, by oversight or otherwise this phrase was retained in the House Bill which was finally passed and its intended meaning is no longer applicable. Only the deceased has authority to donate his remains to a named institution which authority must be in writing as provided by this section.

Dr. M. D. Overholser


The answer to your second and third questions must also be in the negative as a relative cannot make a gift of a deceased person's remains without written consent of the deceased.

CONCLUSION

Under the provisions of Section 194.190, RSMo Cum. Supp. 1965, only a person 18 years or older of sound mind may consent by writing as provided therein to donate his body or parts thereof to a named institution. A college, university, licensed hospital or the State Anatomical Board is not exempted from tort liability by Section 194.190 (6) if such institution removes or uses all or any part of a body for scientific, educational or therapeutic purposes without the written consent of the decedent except for cases where the consent of the decedent had been revoked but the institution acted in good faith without actual knowledge of the revocation.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Gerald L. Birnbaum.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

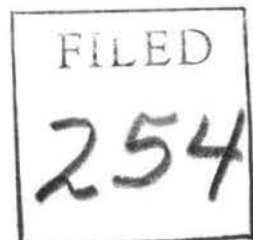
CIRCUIT JUDGES:  
COURT REPORTERS:  
TRANSCRIPTS:

(1) Under Supreme Court Rule 27.26, effective September 1, 1967, post-conviction transcripts are transcripts in civil cases and when ordered by the court under provisions of Section 485.100 RSMo Supp. 1965, the cost of such transcripts shall be paid for by the county, providing the appeal is duly perfected. (2). Unless the circuit court orders the transcript for an indigent under provisions of Section 485.100 the court reporter must furnish the transcript without fee as an officer of the court.

August 10, 1967

OPINION NO. 254

Honorable Byron L. Kinder  
Prosecuting Attorney  
Cole County Courthouse  
Jefferson City, Missouri



Dear Mr. Kinder:

This opinion responds to your request for a determination of the financial responsibility, if any, of the state or a county to pay the reporter fees based on the costs of the transcriptions of the testimony before circuit courts for purposes of appeal by an indigent from an adverse ruling under Supreme Court Rules 27.25 and 27.26.

Inasmuch as a new rule (Supreme Court Rule 27.26) has been promulgated by the Supreme Court which goes into effect September 1, 1967, we assume your question submitted by your letter is prospective in application after that date. We also assume that the appeal would be duly perfected. See Opinion No. 70, dated September 16, 1953, to the Honorable Richard K. Phelps (which is attached).

Your inquiry, no doubt, has its genesis in the new Rule 27.26 subsection (k) which reads as follows:

"(k) COSTS. If the trial court finds that a prisoner desiring to appeal is an indigent person, it shall authorize an appeal in forma pauperis and furnish without cost the transcript of such proceeding for appellate review. The trial court, when the appeal is taken, shall order the official court reporter to prepare the transcript promptly. If the trial court



Honorable Byron L. Kinder

finds adversely to a prisoner on the issue of indigency, it shall certify and transmit to the appellate court a transcript of the evidence on that issue only so as to permit review of that issue by the appellate court."

You refer to Section 485.100 RSMo 1959. This section was amended in 1965 and is currently cited as Section 485.100 RSMo. Supp. 1965, which we quote here for purposes of clarity and convenience.

"For all transcripts of testimony given or proceedings had in any circuit court, court of common pleas or court of criminal correction, the court reporter shall receive the sum of forty-five cents per twenty-five line page for the original of said transcript, and the sum of fifteen cents per twenty-five line page for each carbon copy thereof; the page to be approximately eight and one-half inches by eleven inches in size, with left-hand margins of approximately one and one-half inches and the right-hand margin of approximately one-half inch; answer to follow question on same line when feasible; such page to be designated as a legal page. Any judge, in his discretion, may order a transcript of all or any part of the evidence or oral proceedings, and the court reporter's fees for making the same shall be paid by the county upon a voucher approved by the court, and taxed against the state or county as may be proper. In criminal cases where an appeal is taken by the defendant, and it appears to the satisfaction of the court that the defendant is unable to pay the costs of the transcript for the purpose of perfecting the appeal, the court shall order the same to be furnished, and the court reporter's fees for making the same shall be paid by the county, upon a voucher approved by the court, and taxed against the state or county as may be proper; and in such case the court reporter shall furnish three transcripts in duplication of the notes of the evidence, for the original of which he shall receive forty-five cents per legal page and for the copies fifteen cents per page."

Honorable Byron L. Kinder

Proceedings under Supreme Court Rule 27.26 have been held to be "civil" proceedings (although quasi-criminal in nature) and are governed by civil rules on appeal. Our Supreme Court in *State v. Gullett*, 411 S.W.2d 227, 228 had this to say:

"[1-5] An order overruling a motion to vacate a sentence and judgment, filed under Criminal Rule 27.26, is deemed a final judgment for the purpose of appeal. Criminal Rule 27.26; *State v. Warren*, Mo. Sup., 344 S.W.2d 85 [3]. The rules applicable to appeals in civil proceedings govern, since a proceeding under Criminal Rule 27.26 is regarded as a civil proceeding. *State v. Floyd*, Mo. Sup., 403 S.W.2d 613. Civil Rule 82.04, governing the time and manner in which appeals shall be taken, provides that no appeal shall be effective unless the notice of appeal shall be filed not later than 10 days after the order appealed from becomes final."

Section 514.040 RSMo 1959 (which is referred to in the case of *State ex rel v. Hitchcock* (infra) provides:

"If any court shall, before or after the commencement of any suit pending before it, be satisfied that the plaintiff is a poor person, and unable to prosecute his or her suit, and pay the costs and expenses thereof, such court may, in its discretion, permit him or her to commence and prosecute his or her action as a poor person, and thereupon such poor person shall have all necessary process and proceedings as in other cases, without fees, tax or charge; and the court may assign to such person counsel, who, as well as all other officers of the court, shall perform their duties in such suit without fee or reward; but if judgment is entered for the plaintiff, costs shall be recovered, which shall be collected for the use of the officers of the court."

In a case in point, the St. Louis Court of Appeals in *State ex rel LaRue v. Hitchcock*, 171 Mo. App. 109, 122, in interpreting Section 2261, RSMo 1909 (now Section 514.040, RSMo 1959) held that court reporters must furnish transcripts on appeal in civil cases for poor persons without payment of any fee or charge by such poor persons.

Honorable Byron L. Kinder

The court said l.c. 122:

"\* \* \* \* This is a venerable as well as humane provision of our law. Before the organization of our State government, while we were the Louisiana Territory, the Territorial Legislature by an Act of November 7, 1808, recognized the right of a person to sue as a poor person. [See 1 Territorial Laws Missouri (Ed. 1842) chap. 68, p.223]. One of the first laws passed after the admission of the State and the organization of the State government was an act approved January 11, 1822. [see 1 Territorial Laws Missouri, supra, p. 841]. The fourth section of this act is almost word for word what is now section 2261 of the revision of 1909. It appeared practically in that form in the revision of 1825 (see vol. 1, R.S. 1825, sec. 2, p. 226), and with slight amendments in the several revisions as it finally appears as section 2261, Revised Statutes 1909. This section of the statutes finds firm support, in fact is merely carrying out the provisions of our Bill of Rights (section 10, article 2, of the Constitution), which ordains that 'the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice should be administered without sale, denial or delay.' That principle is older than any of our Constitutions, older even than Magna Charta. That but compelled the King to give formal recognition of a right that had always been claimed by those of the Anglo-Saxon race."

The court said l.c. 123:

"The court stenographer, as we have seen, is an officer of the court. That he is as completely included in section 2261 as is any other officer, is clear. Nothing in that section exempts him in terms. Discussing the status of court stenographers under the provisions of what was section 8256, Revised Statutes 1889, now section 11263, R. S. 1909, Judge Gantt, in State ex rel. v. Wofford, before referred to, says, at page 73, after holding that the court stenographer is an officer of the court, that 'he is not better than the other officers of the court. By section 4293 (now 2712, R.S. 1909), it is provided that "when any appeal shall be taken or

Honorable Byron L. Kinder

writ of error filed, which shall operate as a stay of proceedings, it shall be the duty of the clerk of the court in which the proceedings were had to make out a full transcript of the record in the cause, including the bill of exceptions, judgment and sentence, and certify and return the same to the office of the clerk of the Supreme Court without delay." This of course applies when a cause is taken upon a full transcript. Referring to State ex rel. Miller v. Daily, 45 Mo. 153, and to State v. Armstrong, 46 Mo. 588, the latter overruled in State v. Davidson, 73 Mo. 428, but not on this point, as holding that statute was imperative and personal to the clerk for the performance of the duty imposed upon him by law, Judge Gantt says (l.c. 74): 'Certainly it will be no greater burden on the stenographer to perform his duty than on the clerk, and the clerk cannot perform his duty until the stenographer transcribes the portion of the record that is in the notes. Attorneys are appointed to defend poor persons and give their services. Witnesses and jurors give their time and services for mere nominal fees often at great loss and inconvenience to themselves. The clerk of this court in the course of a year files a large number of transcripts for which he receives no docket fee.' The same may be said with reference to the clerk of our court, it being specifically provided by section 10697, Revised Statutes, 1909, that no docket or other fee shall be required in our court of persons permitted to sue as poor persons. It is also to be said that the court stenographer, being an officer of the court, is in the public service. He is paid for his time and his services in general out of public funds. It is further said by Judge Gantt in the above case (l.c. 73) that the legislation regarding court stenographers being in keeping with the spirit and humanity of the enlightened age in which we live and in harmony with the Constitution, emphasizes the rule of law and of the Constitution 'that when a right exists all the means essential and necessary to the enforcement of that right are implied.'

Honorable Byron L. Kinder

The court said L.C. 126:

"It is impossible, when we consider the long settled policy of our State with reference to opening our courts to those unable to pay, and placing the service of its officers at their disposal without fee or price, to believe that the legislative branch of our government intended to keep from them the services of the most important, in many respects, of all those officers, the court stenographer, when an appeal is to be taken.

"Through all this period of change, from the Act of 1822 before referred to, indeed from the territorial law of 1808, our lawmakers have scrupulously endeavored to provide against the misfortune of poverty and to see to it that poverty was not only not a crime but should not because of that, close the doors of our courts of justice to anyone seeking entrance."

It is clear that court reporter must under the provisions of Section 514.040 prepare a transcript on appeal for an indigent person without receiving any compensation for such preparation.

However, this office has previously held that Section 485.100, RSMo 1949 as amended in 1955 permitted the judge to allow a poor defendant in a civil case a transcript for appeal, the cost of which transcript shall be paid by the county. See Opinion Attorney General, No. 226, dated July 31, 1964, to the Honorable Paul D. Hess, Jr., (which is attached). This office affirmed that position in Opinion 346, dated December 21, 1965, addressed to the Honorable Dan Bollow (opinion attached). The statute (Section 485.100 as amended in 1955) reads as follows:

"For all transcripts of testimony given or proceedings had in any circuit court, court of common pleas and court of criminal correction the court reporter shall receive the sum of forty-five cents per twenty-five line page for the original of said transcript, and the sum of fifteen cents per twenty-five line page for each carbon copy thereof; the page to be approximately eight and one-half inches by eleven inches in size, with left-hand margin of approximately one and one-half inches and the right-hand margin of approximately one-half inch; answer to follow question on same line when feasible; such page to be designated as a legal page. Any judge, in his discretion, may order a transcript of all or any part of the evidence



Honorable Byron L. Kinder

or oral proceedings, and the court reporter's fees for making the same shall be paid by the county, upon a voucher approved by the court, and taxed against the state or county as may be proper. In Criminal cases where an appeal is taken by the defendant, and it appears to the satisfaction of the court that the defendant is unable to pay the costs of the transcript for the purpose of perfecting the appeal, the court shall order the same to be furnished, and the court reporter's fees for making the same shall be paid by the county, upon a voucher approved by the court, and taxed against the state or county as may be proper; and in such case the court reporter shall furnish three transcripts in duplication of the notes of the evidence, for the original of which he shall receive forty-five cents per legal page and for the copy fifteen cents per page."

Comparison of the former Section 485.100 (which is set out immediately above) and the section as amended in 1965 by Senate Bill 135 establishes that the only change is from the word "two" to the word "three" in the last sentence of said section with the result that the reporter must now furnish three transcripts (in criminal cases) under the present law. This is the only change. Accordingly, there is no reason for this office to change its view. Therefore, if a circuit judge orders a transcript in a civil case under Section 485.100 for use by an indigent appellant the cost of such transcript must be paid by the county.

We find no statutory provision for the payment of costs by the state in these proceedings such as the provisions for payment of costs by the state in certain criminal cases provided for in Chapter 550 RSMo. We are enclosing an opinion issued by the Attorney General under date of February 1, 1954 to John P. Peters, holding that in the absence of a statute specifically providing that costs shall be taxed against the state no costs are recoverable from the state.

It is apparent that the General Assembly has taken the view that there is no authorization for taxing costs in these cases against the state. This is shown by the fact that the General Assembly has made no appropriation for payment of costs in these cases.



Honorable Byron L. Kinder

CONCLUSION

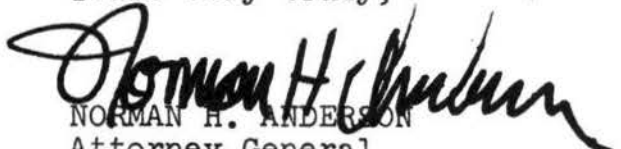
It is the opinion of this office that:

(1). Under Supreme Court Rule 27.26, effective September 1, 1967, post-conviction transcripts are transcripts in civil cases and when ordered by the court under provisions of Section 485.100 RSMo Supp. 1965 the cost of such transcripts shall be paid by the county providing the appeal is duly perfected.

(2). Unless the circuit court orders the transcript for an indigent under provisions of Section 485.100 the court reporter must furnish the transcript without fee as an officer of the court.

The foregoing opinion which I hereby approve was prepared by my assistant, Richard C. Ashby.

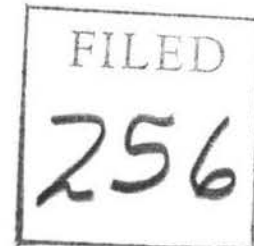
Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

Attachments

OPINION NO. 256  
Answer by Letter-Nowotny

October 30, 1967



Honorable Daniel R. Ferry  
Prosecuting Attorney  
Vernon County  
Nevada, Missouri

Dear Mr. Ferry:

This is in answer to your request for an opinion on four questions concerning Probate Court fees.

Your first question reads as follows:

"(1) If, pursuant to R.S.Mo. 145.150.3, the Probate Court determines the inheritance tax, (instead of appointing an appraiser for that purpose), is the Probate Judge entitled to a fee (such as is authorized for an appraiser by Section 145.190) or other special compensation (other than 2½% of the tax as provided in Section 145.150) for his services in such matter?"

Section 145.150, RSMo 1959, provides that the Probate Court has jurisdiction to determine the amount of the inheritance tax. The Probate Court may, before determining the tax, appoint an appraiser to appraise and fix the clear market value of any property subject to tax. If an appraiser is appointed he is entitled to a reasonable fee. Section 145.190, RSMo 1959.

Enclosed is a copy of an Attorney General opinion, dated February 15, 1937, issued to the Honorable E. L. Colton, which answers your question based on the predecessors of Sections 145.150 and 145.190, supra. That opinion, to which we still adhere, is that the Probate Court is not entitled to the appraiser's fee when the court does not appoint an appraiser.

Honorable Daniel R. Ferry

Your second and third questions reads as follows:

"(2) If the answer to question (1) above is affirmative, how or by what standard does the Probate Court fix the amount of such fee or compensation?

"(3) If the answer to question (1) above is affirmative, is the fee or compensation required by Missouri Constitution Article V Section 24 to be paid monthly into the state treasury or to the county paying the judge's salary?"

Since the answer to your first question is negative it is not necessary to discuss your second and third questions.

Your fourth question reads as follows:

"(4) If the answer to question (1) above is negative, and if a Probate Judge has charged and received such a fee or compensation and it has not been paid into the state treasury or county, what restitution or action, if any, is indicated or required?"

Enclosed is a copy of Attorney General Opinion No. 92, dated August 4, 1953, issued to the Honorable Raymond H. Vogel holding that a county is entitled to recover money illegally collected under color of office by a county recorder. It is our opinion that if a Probate Judge, claiming authority under Section 145.510, supra, illegally charges and receives a fee that this is done under color of his office and an action may be brought to recover the fee. The question then is whether the state or the county may bring such an action.

We note that Vernon County has less than thirty thousand inhabitants. Thus, Section 483.580, RSMo Supp. 1965, is applicable. This section provides for the collection of fees in Probate Courts. Subsection 3 of this section provides in part that:

"3. In counties now or hereafter having thirty thousand inhabitants or less, the judge or clerk of the court shall, at the end of each month, file with the director of revenue a written report, verified by his affidavit specifying the name and court number of each estate in which fees were paid during such month and at the same time pay over to the director of revenue, to be deposited by him with the state treasurer in the magistrate fund, all moneys collected

Honorable Daniel R. Ferry

by him or his clerk as fees, taking two receipts therefor, one of which he shall immediately file with the state treasurer. \* \* \* "

Thus, fees required to be collected in the Vernon County Probate Court belong to the state. Therefore, the state and not the county may bring an action to recover fees collected under color of office.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

WWN:maw

Enclosures - Opinion No. 18  
2/15/37 - Colton

Opinion No. 92  
8/4/53 - Vogel

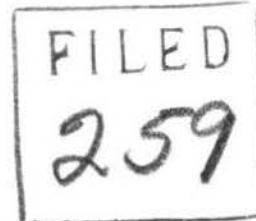
CONFLICT OF INTEREST:  
OFFICERS:  
COUNTY OFFICERS:  
COUNTY JUDGE:  
COUNTY TREASURER:  
SCHOOLS:

County treasurer and county judge  
may serve as director of six-  
director school district.

OPINION NO. 259

June 15, 1967

Honorable William H. Bruce, Jr.  
Prosecuting Attorney  
Reynolds County Courthouse  
Centerville, Missouri 63633



Dear Mr. Bruce:

Recently you requested an opinion from this department as follows:

"Would you please give me your opinion, as to whether or not the following offices are compatible?

"County Treasurer also serving as Member of 6 director school board; Associate Judge of County Court, also serving as member of 6 director school board?

"Finally, I would like to know, whether or not, there is a conflict of interest, under the law, in your opinion, viz: a stockholder in a bank, holding a small number of shares, but who is also a director and the cashier of the bank, is elected as a member of the board of directors of a 6 member school board. The same bank has been, until this time, the official depository of the school funds. Under Sec. 165.201 et seq., this being an odd numbered year, this board must now advertise for bids for a depository. The new member (being also an officer of the bank) of the school board, argues against such advertisement for a new depository and urges the retention of his own bank as such depository, without any such advertisement?"

Honorable William H. Bruce, Jr.

We are enclosing an opinion issued by this department on August 5, 1965, to Honorable Paul D. Hess, Jr., Prosecuting Attorney, Macon County, Macon, Missouri. Also one issued on March 8, 1966, to Honorable Charles H. Sloan, Prosecuting Attorney, Ray County, Richmond, Missouri. These opinions will answer the questions you submit concerning the officer and stockholder of a bank who is a member of the school board.

We are enclosing an opinion issued by this department on August 16, 1954, to Honorable J. C. Sullivan, State Representative, St. Clair County, Lowry City, Missouri, which holds the office of county clerk in fourth class counties is not incompatible with the office of director of a consolidated school district. The principles of law to be applied in determining the incompatibility of public offices are discussed at length in this opinion and should be applied in determining whether the office of county treasurer and associate county judge are incompatible with the office of school director in a six-director school district.

Reynolds County is a fourth class county. We have examined the statutes relating to the duties of a county treasurer and associate county judge in fourth class counties and those concerning the duties of a school director in a six-director school district. We do not find that the official duties of such officers are incompatible with that of a school director in a six-director school district. Reynolds County at present has a county superintendent of schools and therefore, this opinion does not rule as to the right of an associate county judge to hold the office of director of a six-director school district in a county in which the office of county superintendent has been abolished.

#### CONCLUSION

We are of the opinion that a county treasurer and an associate county judge in a fourth class county may serve as a school director in a six-director school district in a county in which the office of county superintendent of schools has not been abolished.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

Enclosures: Op. No. 193, Hess, 8-5-65;  
Op. No. 26, Sloan, 3-8-66;  
Op. No. 87, Sullivan, 8-16-54.



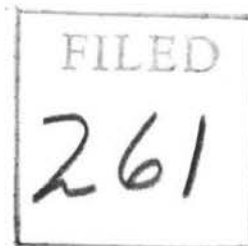
NEPOTISM:  
PUBLIC OFFICERS:  
AFFINITY:  
CONSTITUTIONAL LAW:

The relationship between the Mayor of a third class city and an employee who is the husband of the Mayor's sister, is a relation within the fourth degree, by affinity, within the meaning of Article VII, Section 6, Missouri Constitution 1945 and hence this appointment violates Article VII, Section 6, Constitution of Missouri 1945.

OPINION NO. 261

July 6, 1967

Honorable Stanley Braton  
Prosecuting Attorney  
Johnson County  
Courthouse  
Warrensburg, Missouri 64093



Dear Mr. Braton:

You have requested an official opinion of this office on the question whether the nepotism provision of the Constitution is violated when a Mayor of a third class city appoints to public employ the husband of the Mayor's sister.

The constitutional provision you refer to is Article VII, Section 6, Constitution of Missouri 1945. This section prohibits a public officer from appointing to public office or employment any relative within the fourth degree by consanguinity or affinity.

The Mayor of a third class city has been held to be a public officer within the nepotism provision of the Constitution, State ex rel Ellis et al v. Ferguson, 65 S.W.2d 97.

Affinity "has been defined as being the tie which arises from marriage between husband and blood relations of wife and between wife and blood relations of husband", 2 C.J.S. 992. Affinity has been further defined as meaning "a relationship by marriage, and a kinship by affinity arises through marriage and exists only between each spouse and blood relatives of the other spouse". "Words and Phrases". 2 A. 23 (Supp). Relation by consanguinity means relation by blood.

The relationship of the appointee to the Mayor is that of brother-in-law, said appointee being married to the Mayor's sister.

If the situation here were reversed and the sister's husband was the appointing official, admittedly he could not appoint his wife's brother to a public office. There the relationship by affinity would be quite apparent and prohibited by the constitutional provisions against nepotism.

In the existing case the relationship is still present, the Mayor appointing his sister's husband who is his brother-in-law to public office constitutes a violation of the prohibition against nepotism.

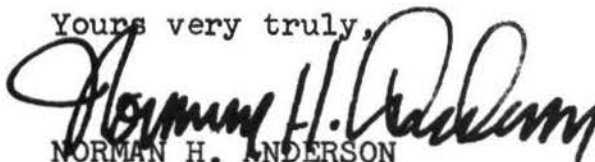
The courts of Missouri support this decision. In the case of State vs. Thomas, 174 S.W.2d 337 (Mo. Sup.) the court held that the appellant was related by affinity to a juror, said juror being the husband of the daughter of appellant's first cousin. Under the reasoning in the Thomas case, it is apparent that the Mayor in this case is related to his sister's husband by affinity.

#### CONCLUSION

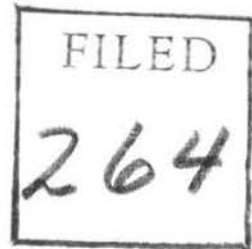
It is the opinion of this office that the relationship between the Mayor of a third class city and an employee who is the husband of the Mayor's sister is a relationship within the fourth degree, by affinity, within the meaning of Article VII, Section 6, Missouri Constitution of 1945 and an appointment by the Mayor to such an employee is in violation of the aforesaid nepotism provision.

The foregoing opinion which I hereby approve was prepared by my assistant, O. Hampton Stevens.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

May 23, 1967



OPINION NO. 264  
Answered by letter-Mansur

Honorable Raymond Howard  
State Representative - District 54  
Missouri House of Representatives  
Capitol Building  
Jefferson City, Missouri

Dear Representative Howard:

This is in reference to your letter of May 5, 1967, requesting an opinion from this department on whether under House Committee Substitute for House Bill No. 616, (74th General Assembly) a copy of which you enclosed, a judgment can be legally rendered when the summons is served on the defendant by certified mail (if such bill becomes law).

Under Section 517.115 of said Bill, a method is provided by which a plaintiff may request the Magistrate Court to have the summons served on the defendant by certified mail by mailing the same to the last known address of the defendant, and if the return receipt shows it was delivered to the defendant and the receipt is signed by him, such service constitutes service of the summons for all purposes.

It is our opinion that a summons served by certified mail as provided by said Bill as now written will support any judgment rendered by the Magistrate Court that could be rendered when the service of process is served by personal service and would be as effective as personal service in supporting the judgment provided it is served within this state.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

MM:db

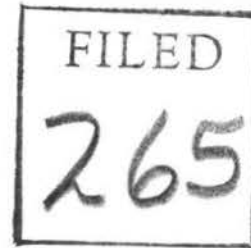
ARREST:

Policemen of third class cities outside of St. Louis County do not have authority to make ordinance violation arrests in hot pursuit beyond city limits.

OPINION NO. 265

October 19, 1967

Mr. James Millan  
Prosecuting Attorney  
Pike County Missouri  
Bowling Green, Missouri



Dear Mr. Millan:

This opinion is issued in response to your request for an official ruling of this office.

You ask whether policemen of a Third Class City have authority to arrest on an ordinance violation in hot pursuit beyond the city limits.

Missouri law is settled that municipal officers do not have power to make ordinance violation arrests outside city limits. That has long been the general rule in this state. City of Advance ex rel. Henley v. Maryland Casualty Co., 302 SW 2d 28; Rodgers v. Schroeder, 287 SW 861.

This rule has a statutory exception. Hot pursuit of ordinance violators across city lines is permitted in St. Louis County. The power does not exist elsewhere; it is withheld from municipal officers in all other Missouri counties. The exclusion is emphatic:

"4. Nothing in this section shall be construed to apply to any act or power of any peace officer in any county of this state other than a county of the first class having a charter form of government \* \* \*" (544.157, RSMo)


Mr. James Millan

CONCLUSION

It is the opinion of this office that policemen of Third Class Cities outside of St. Louis County do not have authority to make ordinance violation arrests in hot pursuit beyond city limits.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Courtney Goodman, Jr.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

October 30, 1967

OPINION NO. 266  
Answer by letter-Nowotny



Honorable Melvin D. Benitz  
Prosecuting Attorney  
Callaway County  
Fulton, Missouri

Dear Mr. Benitz:

This is in answer to your request for an opinion of this office concerning the question whether Callaway County can expend funds raised under a two mill tax levy voted under Section 137.037, RSMo Supp. 1965, for the purpose of revaluating property during the year 1967, in view of the fact that the County Court failed to include in its budget provisions for the expenditure of money raised from such levy.

Enclosed is a copy of Attorney General Opinion No. 302, dated November 27, 1964, issued to the Honorable Gerald Kiser, answering the same question in relation to a special road and bridge tax. It was held that if the funds received from the special road and bridge tax were in excess of the amount budgeted by the County Court that the budgeted amount cannot be changed or amended.

This opinion is controlling here. Therefore, Callaway County cannot expend funds for the purpose of revaluating property during the year 1967 since the County Court failed to include in its budget provisions for the expenditure of such money.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

WWN:maw

Enclosure - Opinion No. 302  
11/27/64 - Kiser



State Agreements: State Plan between State Board of Education  
Primary and Secondary and federal office of Education regarding  
Education Act: library resources, etc., Title II, P.L. 89-10.

Opinion No. 272  
Answered by Letter (DeFeo)

May 12, 1967

FILED  
272

State Board of Education  
Attention: Mr. Rex R. Wyrick  
Director, Title II, P.L. 89-10  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Wyrick:

Per your request we have reviewed the Revised State Plan for Making Available School Library Resources, Text Books, and Other Instructional Materials, under Sections 201-207 of Title II, and Sections 701-705 of Title VII, P.L. 89-10. In this review we have taken into consideration the letter of Governor Warren E. Hearnes to Hubert Wheeler, Commissioner of Education, dated May 25, 1965, wherein the Governor designated the State Board of Education as the state agency to administer Title II, P.L. 89-10, and also Title II, P.L. 89-10 as amended by Sections 121 et seq., P.L. 89-750, 20 U.S.C. 821 et seq., and the Federal Regulations, 32 F.R. 2753, 45 C.F.R. 117.

In Section 2.21 of the State Plan the word "or" at the end of Subsection (a), should be deleted. Note: Federal Regulations, Section 117.37. Also Section 2.21 and the Federal Regulations are vague as to whether or not the State Board would be required to maintain records beyond three years after close of a fiscal year in the event that there is no notification from federal authorities that the records are no longer needed. We recommend this be clarified with the federal authorities.

The statutory references throughout the Plan refer to the Appendix to the 1963 Supplement to the Revised Statutes of Missouri (RSMo Supp. 1963 Appendix). The correct citation is RSMo Supp. 1965. Incorrect statutory citations are found in Sections 1.31, 2.32, 3.32, 3.52 and the Appendix of the State Plan.

Based upon this review, we hereby certify that:

State Board of Education

1. The State Board of Education is the designated state agency in accordance with Section 203 of Title II, P.L. 89-10;
2. The State Board has the authority under state law to submit a State Plan pursuant to Section 203, Title II, P.L. 89-10;
3. The provisions of the 1967 Revised State Plan are consistent with state law.
4. The Commissioner of Education has been duly authorized by the State Board of Education to submit the Revised State Plan and to represent the State Board in all matters pertaining thereto.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

Louis C. DeFeo, Jr.  
Assistant Attorney General

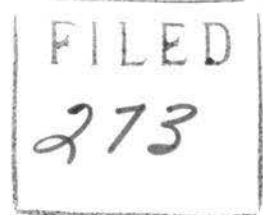
LED:df

Federal-State Agreements:  
Adult Education:

Approval of State Plan between State  
Board of Education and federal office  
of Education for Adult Basic Education  
Program, Title III, P.L. 89-750.

OPINION NO. 273  
Answer by letter-DeFeo

May 5, 1967



State Board of Education  
Attention: Mr. Bill Ghan, Director  
Adult Basic Education  
Jefferson Building  
Jefferson City, Missouri

Re: State Plan under Adult Education Act of 1966

Gentlemen:

Per your request I have reviewed the State Plan for the Adult Basic Education program under the Adult Education Act of 1966 (Title III, P.L. 89-750), which plan was adopted by the State Board on March 31, 1967.

Section 1.22 of the State Plan places responsibility on the State Board for federal funds that are lost or diverted. I call to your attention the difficulty incurred under the Special Milk Program in connection with overclaims of the Warrenton School District. The practices in administering this program should include adequate safeguards to prevent any loss or diversion of funds. I recommend that this office review the form of agreement between the state and local agencies so that we might recommend appropriate provisions to protect the State Board and prevent loss or diversion of funds.

Section 1.75(b), of the State Plan, apparently has a typographical error in line 8.

The federal law, P.L. 89-750, Section 306(a), provides that the State Plan shall:

"(4) provide for grants to public and private nonprofit agencies for special projects, teacher-training and research;"

State Board of Education

The federal guidelines, Section 2.1, require description regarding such grants. Section 2.1 of the State Plan is limited to public school agencies and fails to provide for grants to other public agencies and to private nonprofit agencies. It also fails to provide for grants for teacher-training and research. I am unable to find any provision in the State Plan for grants as required by Section 306(a)(4) of the federal law. Therefore, the State Plan should be amended to conform with the federal requirements. Also you may desire to add specification on the subject of teacher-training and research.

Section 2.31 regarding grants to private nonprofit agencies is insufficient.

The State Constitutional provision which is directly responsive to the inquiry of the federal guidelines is Article III, Section 38(a). This section prohibits the grant of public money to any private person or organization. This section further provides:

"Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States."

This office has held in Opinion No. 100, Hearnese, 1-18-66, that the quoted provision authorizes the use of federal grants for the carrying out of the public purposes for which the federal government has designated that the money should be used.

Article VI, Section 23, prohibits political corporations and subdivisions (which would include school districts and state institutions of higher education) from using public monies in the aid of a private person or organization.

Neither Article III, Section 38(a), or Article IV, Section 23, place limitations upon federal funds. Public funds within the meaning of these provisions refers only to funds belonging to the state or a subdivision thereof raised by operation of some general law, State ex rel St. Louis Police Relief Ass'n v. Igoe, et al., 340 Mo. 1166, 107 S.W.2d 929, 933.

Also these constitutional prohibitions are only against the use of the grant of public monies to private persons and organizations, for private purposes. If the grant is for a public purpose, it is not constitutionally prohibited. Jasper County Farm Bureau v. Jasper County, 315 Mo. 560, 286 S.W. 381, 384. State ex rel State Highway Commission v. Eakin, Mo., 357 S.W.2d 129, 134 (grant to public utility).

State Board of Education

Also the constitutional limitations above-mentioned only apply to the gift of public monies and do not prohibit the use of public monies in payment for services rendered. Public monies may be paid to a private person or corporation including a religious organization, if there is an exchange of consideration. Kintzele v. City of St. Louis, Mo., 347 S.W.2d 694.

According to the State Plan, paragraph 1.61, the program of instruction is to consist of "elementary level education for adults with emphasis on the skills of reading, writing, speaking, listening, arithmetic, citizenship, health practices, consumer knowledge, human relations, and home and family living." Also note that Section 313, Title III, P.L. 89-750 provides that no grant may be made for any educational program related to sectarian instruction.

Article IX, Section 8, prohibiting grants of public monies for religious purposes is not in point since the program here is restricted to secular education. If the Board feels it necessary for the State Plan to refer to Article IX, Section 8, then it should also refer to Article I, Section 7, which prohibits the use of public money in aid of any religion.

Therefore, in order for this office to certify approval of the State Plan, the following amendments will be necessary:

1. Section 2.1 of the State Plan should be amended to conform with Section 306(4), P.L. 89-750, to read as follows:

"2.1 - The State Plan provides for grants to public and private nonprofit agencies for special projects, teacher-training and research, which are designed to carry out any or all of the following objectives:"

2. Section 2.31 of the State Plan should be amended to read as follows:

"2.31 - The State of Missouri is not prohibited from making grants to private nonprofit agencies for purposes within the scope of the State Plan. Our State Constitution authorizes redistribution of federal funds together with state funds for any public purpose designated by the United States (see Plan, Section 7.8)."

3. I recommend that the reference in the present Section 2.31 of the State Plan to Article IX, Section 8, of the Missouri Constitution be deleted

State Board of Education

because it is not responsive to the requirements of the federal guidelines. If the Board be of the opinion that it is necessary to refer to constitutional prohibitions against aid to religion, then a Section 2.32 should be added to read as follows:

"2.32 - Public funds cannot be granted to religious organizations for sectarian purposes (see Plan, Section 7.9)."

4. Section 7.8 of the State Plan should be deleted and in its place should be quoted the provisions of Article III, Section 38(a), of the Missouri Constitution.

5. If the Board elects to include new Section 2.32 quoted supra, then an additional new Section 7.9 should be added, which section should quote the provisions of Article IX, Section 8, and also the provisions of Article I, Section 7, of the Missouri Constitution.

In order to expedite the handling of this matter the certificate of the Attorney General has been executed upon your assurances that the State Plan will be amended as set out above.

Very truly yours,

Louis C. DeFeo, Jr.  
Assistant Attorney General

Enclosure - Opinion No. 100  
1-18-66, Hearnese



November 7, 1967



Honorable Jack K. Smith  
Executive Secretary  
Missouri Water Pollution Board  
P. O. Box 154  
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter dated January 30, 1967, submitting for our appraisal the Missouri Water Pollution Board regulations adopted January 19, 1967, relating to turbid water discharges and intermittent or accidental pollution of the waters of this State.

We have read these regulations and Chapter 204, Revised Statutes of Missouri, 1959, as amended, and it is our view that these regulations are constitutional, and are within the statutory authority of the Missouri Water Pollution Board.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

May 23, 1967



OPINION NO. 278  
Answered by letter-Siddens

Honorable Jasper M. Brancato  
Senator, 11th District  
Jackson County  
619 W. 12th Street  
Kansas City, Missouri

Dear Senator Brancato:

This is in response to your request for an opinion regarding a proposed exhibition of matador skills as a possible violation of Section 563.660 RSMo 1959. Section 563.660 provides:

"Any person who shall keep or use, or in any way be connected with or interested in the management of, or shall receive money for the admission of any person to, any place kept or used for the purpose of fighting or baiting any bull, bear, dog, cock or other creature, and any person who shall encourage, aid or assist or be present thereat, or who shall permit or suffer any place belonging to him or under his control to be so kept or used, shall, on conviction thereof, be guilty of a misdemeanor."

The vital language in this statute would appear to be "used for the purpose of fighting or baiting any bull \* \* \* ." The Supreme Court of Missouri in the case of *State ex rel Attorney General v. Canty*, 105 SW 1078, considered a similar bullfight performance or exhibition to be a public nuisance. Dictionary definitions of baiting and bull baiting are: The practice of baiting the bulls with dogs; anything that allures; a lure; enticement; temptation; the act of baiting; a state of worry or vexation; to persecute, harass or torment; to exasperate with repeated attacks especially wantonly or maliciously; to offer bait to; to allure; to entice.

Honorable Jasper M. Brancato

As we understand the proposed exhibition it would appear that the same would fall within the prohibition of the statute.

We have been informed that the City Counselor of Kansas City has been consulted about this same problem and he has given an oral opinion that the proposed performance would be a violation of the aforementioned statute. We concur in his view.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

JGS:ms:db

STATE HIGHWAY PATROL:  
ARREST:  
CITIES, TOWNS AND VILLAGES:  
FOURTH CLASS CITY:

State Highway Patrol is without authority to enforce municipal ordinances and a fourth class city cannot confer such authority by ordinance.

OPINION NO. 280

December 12, 1967

Colonel Edmund I. Hockaday  
Superintendent  
Missouri State Highway Patrol  
General Headquarters - P. O. Box 566  
Jefferson City, Missouri 65101



Dear Colonel Hockaday:

Recently you requested an opinion from this office as to whether members of the State Highway Patrol have legal authority to make arrests for violations of municipal ordinances. The ordinances to which you refer were enacted by the Board of Aldermen of the City of Lake Ozark, Missouri, and provide that any person who consumes alcoholic beverages on the public streets or highways shall be guilty of a misdemeanor, and the city marshal, sheriff and State Highway Patrol are expressly given authority to enforce the same.

We are enclosing herewith an opinion issued by this office on March 11, 1947, to Honorable Rufe Scott, Prosecuting Attorney, Stone County, Missouri, in which it was held that the authority of a sheriff as conservator of the peace is county-wide and includes arrest if the act complained of is an offense against both the municipal ordinance and the state law; but if it does not constitute a state offense, it is not the duty of the sheriff to enforce such ordinance.

Section 43.180, RSMo 1959, provides that the members of the State Highway Patrol shall have full power and authority as now or hereafter invested by law in peace officers when working with and at the request of the sheriff of any county or the chief of police of any city or under the direction of the Superintendent of the State Highway Patrol to arrest anyone violating any law in their presence or in the apprehension and arrest of any fugitives from justice or on any felony violation. The members of the State Highway Patrol are given full authority to make investigations connected with any crime of any nature.

Colonel Edmund I. Hockaday

Section 43.200, RSMo 1959, provides in part that the Superintendent of the Highway Patrol shall see that every member of the Highway Patrol is thoroughly instructed in the powers of police officers to arrest for misdemeanors and felonies.

Section 43.220, RSMo 1959, provides that neither the Governor, the Highway Commission nor the Superintendent of the Highway Patrol shall have any power, right or authority to command or order or direct any member of the Highway Patrol to perform any duty or service not authorized by this chapter.

The violation of a city ordinance is not a crime in the constitutional sense nor a misdemeanor under our criminal code. City of Ava v. Yost, 375 S.W.2d 884; Marshall v. Kansas City, 355 S.W.2d 877. Violations of municipal police regulations are not "crimes." Delaney v. Police Court of Kansas City, 167 Mo. 667, 67 S.W. 589.

We believe that under the above statutory provisions, the State Highway Patrol may work with or when at the special request of the chief of police of any city may cooperate in the investigation and arrest of any person violating a state law but this does not include violations of municipal ordinances.

Lake Ozark is a fourth class city. Section 85.620, RSMo 1959, provides that police of a fourth class city may be appointed in such numbers for such times and in such manner as may be prescribed by ordinance. They shall have power to serve and execute all warrants, subpoenas and other process and make arrest in the same manner as the marshal. Section 79.250, RSMo, requires all officers appointed in a fourth class city to be residents of such city. Under these statutes, unless a person is a resident of the city and appointed as a member of the police force, he has no authority to make arrests, and any ordinance of the city attempting to confer such authority in any other manner is void. Graham v. State, 143 Ga. 440, 85 S.E. 328.

#### CONCLUSION

It is the opinion of this office that the Missouri State Highway Patrol does not have authority to enforce municipal ordinances in a fourth class city and that an ordinance of a

Colonel Edmund I. Hockaday

fourth class city purporting to grant such authority is void and of no effect.

The foregoing opinion, which I hereby approve, was prepared by my assistant Moody Mansur.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

Enclosure: Opinion to  
Honorable Rufe Scott  
3-11-47



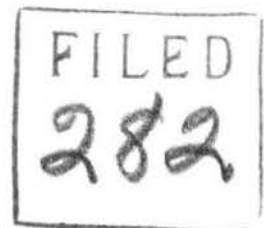
COUNTY LIBRARY DISTRICT:  
PETITION FOR:  
COUNTY COURT: DUTIES:  
MANDATORY: WHEN:

If petition for establishing county library district outside all cities and towns with tax supported libraries of county, filed with county court of such county, under Section 182.010 RSMo 1959, and court finds

petition to comply with section, it shall make record required by section. Court without discretion has mandatory duty of ordering election held. Court has discretion in setting date, and may order election held on next annual school election date or on special election date of petition. Cannot hold election less than forty-five days after filing of petition.

OPINION NO. 282

August 3, 1967



Mr. Charles O'Halloran  
State Librarian  
Missouri State Library  
State Office Building  
Jefferson City, Missouri 65101

Dear Mr. O'Halloran:

This office is in receipt of your request for a legal opinion regarding the construction of Section 182.010 RSMo 1959. Your request reads in part as follows:

"My question is, does the county court have any discretion in calling an election or, having found the petitions adequate and satisfactory, must the court call the election without fail?

"May I ask your opinion further as to whether the county court in this situation possesses any discretion as to the date of the election if a date has been stated in the petition. In other words, may the county court postpone the date of the election beyond the dates in the petition for reasons of its own?"

Honorable Charles O'Halloran

That part of Section 182.010 RSMo 1959 to which your first inquiry is directed reads as follows:

"1. Whenever qualified electors equal to five per cent of the total vote cast for governor at the last election in any county, outside of the territory of all cities and towns in the county which at the time of election as hereinafter provided maintain and control free public and tax supported libraries pursuant to other provisions of this chapter except as provided in section 182.030 shall petition in writing the county court, asking that a county library district of the county, outside of the territory of all such aforesaid cities and towns, be established and be known as '\_\_\_\_\_' county library district, and asking that an annual tax be levied for the purpose herein specified, and specifying in their petition a rate of taxation not less than one mill nor more than two mills on the dollar of assessed valuation; then the county court, if it finds the petition was signed by the requisite number of qualified petitioners and verified in accordance with the provisions of section 126.040, RSMo, pertaining to initiative petitions, shall enter of record a brief recital of the petition, including a description of the proposed county library district, and of its finding; and shall order that the propositions of the petition be submitted to the voters of the proposed county library district at the next annual school election, or at a special election to be held on date stated in the petition. Under no circumstances shall the election be held less than forty-five days after the filing of the petition \* \* \*."

Under provisions of Section 182.010 supra, the procedure for organization of a county library district is started by filing of a petition with the county court of the county of the proposed library district. The petition shall contain the signatures of qualified voters, equal in number to five percent of the total vote cast for governor at the last election outside the territory of all cities and towns of the county maintaining free public, tax supported libraries. The petition shall ask for the establishment of "\_\_\_\_\_" county library district", and shall specify a rate of not less than one nor more than two mills on the dollar assessed valuation for library taxes.

Honorable Charles O'Halloran

If the court finds the petition to contain the required number of signatures of qualified voters, verified in accordance with Section 126.040, it "shall enter of record a brief recital of the petition, including a description of the proposed county library district, and of its finding; and shall order that the propositions of such petition be submitted to the voters of the proposed county library district at the next annual school election, or at a special election to be held on the date stated in the petition. Under no circumstances shall the election be held less than forty-five days after filing of the petition."

The word "shall" has been used twice in the last quoted portion of Section 182.010, in connection with the duties of the court after the filing of the petition, and it is believed the proper construction of this word is of vital importance and the answer to the first inquiry is dependent upon same.

The primary rule of all statutory construction is to ascertain and give effect to the intent of the lawmakers, from the words used in the statute if possible. In such construction words are to be construed in their plain or ordinary sense rather than in a technical sense in the absence of a legislative intent to give them a technical meaning.

The general rule with reference to the construction of the word "shall" appearing in a statute in connection with an act or duty of a public officer affecting the right or welfare of the public is that "shall", is imperative where the public or persons have rights which ought to be exercised or enforced, but may be held directive, only where no rights or benefits depend upon its imperative use, or permissive when necessary to accomplish the purpose of the legislative act or to sustain the constitutionality of a statute, as it was held in the case of State v. City of St. Louis, 2 S.W.2d 713.

Section 182.010 supra, grants the right to qualified voters of any county outside the territory of cities and towns of the same county, maintaining free tax supported libraries, to organize a county library district by following the procedure provided by the section.

After that step in such procedure has been reached at which the county court has found the petition filed with it to be in proper form and verification, the mill tax shown, within the statutory limitation and the required number of qualified voters' signatures thereon, all in accordance with the statute, it then becomes the duty of the court to make the necessary entries in its

Honorable Charles O'Halloran

record and to order an election to be held on the date of the next annual school election or on the date set out in the petition for a special election, at which the propositions of the petition shall be submitted for approval or disapproval of the voters of the proposed library district. The court has no discretion in the matter, but has the mandatory duty of calling the election and it cannot deny the voters the right of voting upon the propositions of the petition, thereby defeating the legislative intent and purpose in enacting Section 182.010 supra, by refusing to call an election.

After finding the petition to be sufficient, the court has no discretion as to whether it will or will not call the election, and shall call same as noted above, it is believed the court does have discretion in setting a date for the election. It may order the election held on the date of the next annual school election or on the date set out in the petition for a special election, as it may deem proper under the circumstances provided however that such election cannot be held less than forty-five days after the filing of the petition.

For reasons given above, our answer to the first inquiry is that upon finding a petition for establishing a county library district, under Section 182.010 supra, sufficient, the county court has no discretion, but has the mandatory duty of calling an election at which the voters of the proposed county library district may vote upon the petition-propositions. The court does have discretion in setting the date of election and it may order the election held on the date of the next annual school election or on the date for special election shown in the petition, as it may choose, provided however, that such election cannot be held less than forty-five days after the filing of the petition.

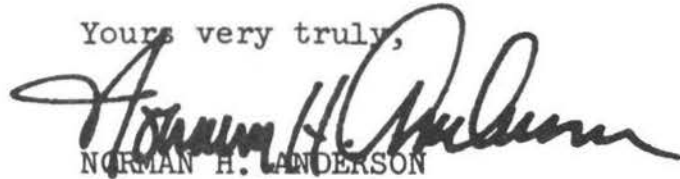
#### CONCLUSION

Therefore, it is the opinion of this office that if a petition for establishment of a county library district outside all cities and towns of a county maintaining tax supported libraries, is filed with the county court of any such county, as provided by Section 182.010 RSMo 1959, and the court finds the petition to comply with the section, it shall make its record entries in the matter as required by such section. The court then has no discretion, but has the mandatory duty of ordering an election to be held. However, upon finding the petition to be sufficient, the county court has discretion in setting an election date. The county court may order the election held on the date of the next annual school election or on the date set out in the petition for a special election as the county court deems proper provided, however, that the election shall not be held less than forty-five days after the filing of the petition.

Honorable Charles O'Halloran

The foregoing opinion which I hereby approve was prepared by my assistant, Paul N. Chitwood.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Norman H. Anderson". The signature is fluid and cursive, with the first name "Norman" being more prominent.

NORMAN H. ANDERSON  
Attorney General

August 30, 1967



Honorable Lowell McCuskey  
Prosecuting Attorney  
of Osage County  
Linn, Missouri 65051

Dear Mr. McCuskey:

With respect to your inquiry about accreted lands, it would appear that the lands salable by the counties under Chapter 241 of the Revised Statutes 1959 are swamp lands and those "...formed by the abandonment of waters from the beds of lakes and rivers or by the formation of islands ..." (Sexton v. Dunklin County, 246 S.W. 195) True accretions belong to the owner of the lands to which they are accreted, Conran v. Girvin, 341 S.W. 2d 75.

The county court may sell the lands covered in Chapter 241 by private sale, Section 241.160 RSMo 1959.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General



INSURANCE:  
CREDIT SALES:  
INSTALLMENT SALES:  
CONSUMER CREDIT:

Insurance upon the lives of installment credit account holders must be made pursuant to 408.260. Companies issuing such insurance must be authorized to do business in Missouri.

OPINION NO. 285

October 17, 1967

Honorable Donald L. Manford  
State Representative - 18th District  
Missouri House of Representatives  
Capitol Building  
Jefferson City, Missouri



Dear Representative Manford:

Reference is made to your letter of May 23, 1967, concerning the legality of a proposed life insurance plan of the John Alden Life Insurance Company insuring the revolving credit account of an individual payable to Gamble-Skogmo, Inc. Under the plan, a group policy is issued to Gamble-Skogmo, Inc., the policyholder, and the individual account holders of the Gamble stores are the individual insured members of the group. You have enclosed with your letter a copy of the insurance certificate which is furnished to the individual account holder. The accounts in question are revolving credit accounts, and the amount of the insurance automatically increases or decreases monthly to the balance of such installment accounts.

We have discussed this matter with you by telephone conversation and are informed that you seek our opinion in regard to the account holder's obligation for insurance premiums when such insurance is added to the account after such account has been in existence. Some of these accounts have been in existence for a number of years without the inclusion of insurance on the life of the account holder for the amount of the account. You stated that the account holders are notified by the Gamble Company that such insurance has been added to the account and the premium therefor shall be charged to the account unless the

Honorable Donald L. Manford

Gamble Company is notified in writing to the contrary by the account holder. You have further informed us that such notices come to the account holder through the mail, together with quantities of advertising material, and the notice is susceptible to being overlooked by the account holder.

We have not been furnished a copy of the written contract, if any, between the Gamble Company and the account holder at the time the account was opened.

Statutory provisions in regard to retail time sales are set forth in Sections 408.250 through 408.370, RSMo Supp. 1965. (All statutory references herein are to RSMo Supp. 1965, unless otherwise specified). Section 408.260 provides that each retail time contract shall be in writing, signed by the buyer and the seller, and completed prior to being signed by the buyer. Section 408.260, subparagraph 5 (4), provides that the contract shall contain any provision for insurance issued in connection with the contract and shall separately state the amount for any insurance premium. Section 408.260, subparagraph 6, specifically authorizes revolving credit retail time contracts.

Section 408.280 sets forth detailed provisions concerning insurance issued in connection with retail time contracts. It is provided that all insurance shall be written by an insurance company authorized to do business in this state and that the applicable premiums shall be in accordance with rates approved by the insurance department of this state. The retail seller may require of the retail buyer life insurance for the protection of the seller. However, the buyer shall have the privilege of purchasing the required insurance from a company of his own selection.

Upon inquiry to the Division of Insurance we have learned that John Alden Life Insurance Company is not authorized by the State of Missouri to do business in this state. Therefore, the group life insurance policy issued to Gamble-Skogmo, Inc., by the John Alden Life Insurance Company upon the lives of account holders of the Gamble Company who have entered into retail time agreements with the Gamble Company in this state is contrary to Section 408.280.

You have indicated that many of the accounts with the Gamble Company about which you inquire have been in existence for several years and that life insurance on the lives of the account holders

Honorable Donald L. Manford

has not been a part of the contract between the Gamble Company and the account holders. You have further indicated that the Gamble Company has notified the account holders that insurance on the lives of such account holders will be issued and premiums therefor will be added to such accounts unless the account holders notify the Gamble Company in writing to the contrary. It has been noted above that Section 408.260 requires each retail contract to be signed by both the buyer and the seller. The contract must be completed prior to signing and must include any provisions for insurance which may be issued and charged to the buyer in connection with such contract. Therefore, the indicated addition of insurance provisions with charges therefor to the account holder would be contrary to Section 408.260 unless the contract with the buyer meets all of the provisions of the cited section.

Section 408.280 provides that the Commissioner of Finance shall issue regulations governing the types and limits of insurance and the issuance of policies in connection with retail time transactions. Upon inquiry of the Division of Finance we are informed that no regulations have been issued in regard to the form and content of group insurance policies for revolving credit account holders.

The provisions of Chapter 376, RSMo 1959, apply to life insurance companies authorized to do business in this state. Among other things, Chapter 376 includes provisions which shall be contained in life insurance policies. The Division of Insurance has supervisory authority over the forms of life insurance policies. However, as noted above, the John Alden Life Insurance Company is not authorized to do business in this state, and therefore, the group policy in question has not been approved by the Division of Insurance.

#### CONCLUSION

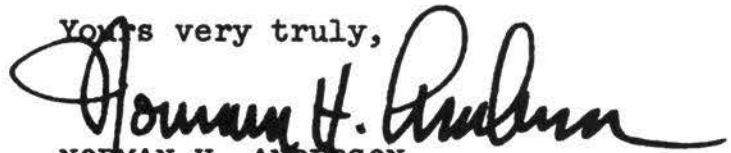
The issuance of insurance on the lives of those to whom retail credit has been extended pursuant to time sales contracts is governed by Sections 408.250 through 408.370, RSMo Supp. 1965. Companies issuing such insurance must be authorized to do business in the State of Missouri. The addition of insurance provisions to previously existing outstanding time sales contracts must comply strictly with the provisions of 408.260, RSMo Supp. 1965.

Honorable Donald L. Manford

The addition of insurance provisions to previously existing revolving credit installment accounts by Gamble-Skogmo, Inc., not made in strict compliance with Section 408.260, RSMo Supp. 1965, is unauthorized by law and no obligation for insurance premiums is incurred by an account holder for failure to notify the company in writing that such insurance is not wanted. The John Alden Life Insurance Company is not authorized by the State of Missouri to do business in this state and the issuance of policies by the company upon the lives of account holders of the Gamble Company in this state is contrary to Section 408.280, RSMo Supp. 1965.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Norman H. Anderson", written in a cursive style.

NORMAN H. ANDERSON  
Attorney General

INSURANCE: A corporation which agrees for a specified annual payment to reimburse or furnish, wholly or partially, to its contract holders financial responsibility bonds, bail bonds, accident-travel expenses, legal expenses, emergency road service, towing, and tire changing arising from the operation of motor vehicles is engaging in the insurance business.

OPINION NO. 286

September 5, 1967

Honorable Robert D. Scharz  
Commissioner of Insurance  
State of Missouri  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. Scharz:

Reference is made to your recent request for a formal opinion from this office in regard to a contract issued by the Allied Auto Acceptance Corporation. You have inquired whether or not Allied Auto Acceptance Corporation is doing the business of insurance by issuing this contract.

The contract in question was issued for a period of one year in consideration of the payment of \$105. The contract is described generally on its face as follows: "A SERVICE INSTITUTED FOR THE BENEFIT OF ITS CONTRACT HOLDERS" The following words appear on the face of the contract in bold type preceded by stars: SAFETY: SECURITY: SERVICE: PROTECTION: The contract is made applicable to a named applicant and a named motor vehicle. It is provided that the company will furnish a Financial Responsibility Bond up to \$20,000 for the contract holder or will reimburse the contract holder for the cost for such bond if requirement for such bond arises by reason of the ownership or operation of the motor vehicle. It further provides that the company will furnish to the contract holder or reimburse for the cost thereof a Bail Bond not to exceed \$5,000 for arrest of the contract holder arising from the ownership and operation of the motor vehicle. Other contractual provisions are offered under the following descriptions: "MONEY FOR ACCIDENT-TRAVEL EXPENSES; LEGAL EXPENSES; CAR THEFT REWARD; DAY AND NIGHT EMERGENCY ROAD SERVICE; TOWING; and TIRE CHANGING" A further description of these contractual provisions is unnecessary for the purposes of the conclusion herein.



Honorable Robert D. Scharz

Missouri's statutes do not define the term "insurance". In *State ex rel. Inter-Insurance Auxiliary Company v. Revelle*, 257 Mo. 529, 1.c. 535, 165 S.W. 1084, the essential elements of a contract of insurance are alluded to in the following language:

"The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss."

In the case of *Rogers v. Shawnee Fire Insurance Company of Topeka, Kansas*, 111 S.W. 592, 132 Mo.App. 275, 1.c. 278, the Kansas City Court of Appeals used the following language in discussing the words "indemnity" and "insurance":

"Indemnity signifies to reimburse, to make good and to compensate for loss or injury. (4 Words and Phrases, p. 3539) Insurance is defined by Bouvier, 'to be a contract by which one of the parties, called the insurer, binds himself to the other called the insured, to pay to him a sum of money, or otherwise indemnify him.'"

In *Richards On Insurance*, Fifth Edition, Vol. 1, Sec. 4, p. 11, we find the following:

"Where statutory definition is lacking, what constitutes 'insurance' is left to judicial decision and temperament."

At 44 C.J.S., Insurance, Section 59, p. 528, we consider the following language appropriate as an introduction to our problem:

"Whether a company is engaged in the insurance business depends, not on the name of the company, but on the character of the business that it transacts, and whether that business constitutes an insurance business subject to regulation as such is determined by the usual course of business, and whether the assumption of a risk, or some other matter to which it is related, is the principal object and purpose of the business. In determining whether a business is an insurance business, the nature of the contract or forms in which the parties state their relations must be considered, and whether a contract is one of insurance is determined by its purpose, effect, contents and import, and not merely from its terminology, although it does not, on its face purport to be one of insurance, and even though it contains declarations to the contrary."



Honorable Robert D. Scharz

The following admonitions are not to be overlooked when considering whether an association is unlawfully engaged in the insurance business, and are found at 44 C.J.S., Insurance, Section 70, p. 549:

"The prohibition against engaging in the business of insurance without the prescribed authority is held absolute. In determining whether or not an association is engaged in the business of insurance in violation of law, the court is concerned with the plan as a whole and not with artificially segregated single phases of the plan."

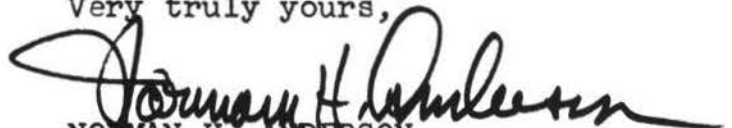
Under the agreement of Allied Auto Acceptance Corporation with its contract holder the company has promised to indemnify the contract holder if he becomes obligated to furnish a Financial Responsibility Bond or a Bail Bond. The company has also agreed to indemnify the contract holder for accident-travel expenses, legal expenses, emergency road service, towing, and tire changing in the event that the contract holder incurs such expenses through the ownership and operation of the motor vehicle described in the contract. Thus, under the legal principles set forth above the contract in question constitutes engaging in the insurance business by Allied Auto Acceptance Corporation.

#### CONCLUSION

It is the opinion of this office that the contract described herein executed by Allied Auto Acceptance Corporation is a contract of insurance.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Thomas J. Downey.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

Certification of the Attorney General of Missouri

This office has previously considered the authority of the State Board of Education and reviewed the State Plan for the Education of Handicapped Children under Title VI Public Law 89, 750. On July 19, 1967, we certified this Plan (Opinion 287-1967.) We have reviewed the changes made in the Plan since our certification of July 19, 1967, and hereby certify:

1. That the State Board of Education is qualified as a state educational agency in accordance with Title VI of the Elementary and Secondary Education Act of 1965, as amended;
2. That said agency has the authority under State Law to submit a State plan pursuant to Title VI of the Elementary and Secondary Education Act of 1965, as amended;
3. That all the provisions of the revised plan are consistent with State law;
4. That the Commissioner of Education has been duly authorized by the State Board of Education to submit the State plan and to represent the State Board of Education in all matters pertaining thereto.

NORMAN H. ANDERSON  
Attorney General

*Louis C. DeFeo, Jr.*  
Louis C. DeFeo, Jr.  
Assistant Attorney General

Op 287-67  
Revised

11-2-67

Date.

August 21, 1967

**Opinion No. 289**  
**Answer by Letter-Derman**

Honorable Michael Kinney  
State Senator  
604 Chestnut Street  
St. Louis, Missouri



Dear Senator Kinney:

This is in answer to your recent request for an opinion of this office concerning the question of whether automobiles owned by a Missouri Corporation with its registered agent and office in the City of St. Louis, which are garaged overnight by its employees who live in St. Louis County are to be returned for property taxation in the City of St. Louis, or St. Louis County.

Section 137.095, RSMo 1959, provides that all tangible personal property of business and manufacturing corporations:

"\* \* \* shall be taxable in the county in which such property may be situated on the first day of January of the year for which such taxes may be assessed, and every business or manufacturing corporation having or owning tangible personal property on the first day of January in each year, which shall, on said date, be situated in any other county than the one in which said corporation is located shall make return thereof to the assessor of such county or township where situated, in the same manner as other tangible personal property is required by law to be returned." \* \* \*

In *Buchanan County v. State Tax Commission*, Mo.Sup., 1966, 407 S.W.2d 910, the Court stated that the provisions in Section 137.095 that tangible personal property "\* \* \* 'shall be taxable in the county in which such property may be situated' \* \* \*" is not the same as providing that the property shall be taxable where "physically present" on that day. The court in discussing the meaning of the word "situated" said, 1.c. 914:

" \* \* \* In its application to personal property, the word 'situated' used in a statute authorizing or directing the taxation of property, connotes a more or less permanent location or situs. Brock & Company v. Board of Supervisors of Los Angeles County, 8 Cal.2d 286, 65 P.2d 791, 110 A.L.R.700. See also Colonial Life & Accident Insurance Co. v. South Carolina Tax Commission, 233 S.C. 129, 103 S.E.2d 908, 919; Appeal of Pilot Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633; Assessors of Sheffield v. J. F. White Contracting Co., 333 Mass. 306, 130 N.E.2d 696. Yellow Mfg. Acceptance Corporation v. Rogers, 235 Mo.App. 96, 142 S.W.2d 888, pertained to a statutory requirement that a mortgage be recorded 'where the property mortgaged was situated at the time of executing such mortgage.' After quoting from the Brock case, supra, the court stated that the word 'situated' as used in the statute 'clearly implies some element of permanency.' When used in statutes referring to the taxation or mortgaging of personal property, the word 'situated' has been held to require more than a mere temporary presence. Montague Bros. Inc. v. W. C. Shepherd Co., 231 N.C. 551, 58 S.E.2d 118; Assessors of Sheffield v. J. F. White, supra. It has also been held that temporary presence is not sufficient, General Exchange Insurance Corporation v. Dudley, Tex. Civ.App., 128 S.W.2d 452, and that the word 'situated' refers to the place where the personal property is regularly kept, Rapid City Nat. Bank v. Spouse, 73 S.D. 493, 44 N.W.2d 437, with a more or less permanent location or situs. Universal C.I.T. Credit Corp. v. Walters, 230 N.C. 443, 53 S.E.2d 520, 10 A.L.R.2d 758. \* \* \*"

Under the holding of this case, the automobiles in question are not necessarily taxed at the place where they were physically located on January 1, but may be taxed only where they had acquired a more or less permanent location or situs on that date. This question is factual as well as legal and any judgment determining the situs of the automobiles and in which jurisdiction they were "situated" on January 1, 1966, must be made upon all the facts in each individual case.

Such a determination could be made only by a judicial proceeding in individual cases wherein all interested parties could develop all the necessary facts. This office is not qualified to make such a determination in individual cases. Thus, we may only advise the persons or company involved to discuss the matter with the taxing

Honorable Michael Kinney

authorities in both the City and the County, and, if a satisfactory solution, is not reached to seek a judicial determination of the problem.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

JHD:maw

AUDITOR: Section 50.055, RSMo 1959, and Section 29.230, RSMo  
COUNTIES: Supp. 1965, are alternative methods by which the  
COUNTY COURT: State Auditor can be requested to audit a second class  
county. If a request is properly made under either  
statute, the State Auditor must audit the county. In  
either event the county must pay for the cost of the  
audit.

OPINION NO. 293

June 15, 1967

Honorable Haskell Holman  
State Auditor  
Capitol Building  
Jefferson City, Missouri



Dear Mr. Holman:

This is in answer to your request for an opinion of this office,  
which request reads as follows:

"This office hereby requests an official ruling  
by your department on the following questions:

1. Would the state auditor be authorized  
to audit the accounts of the various offi-  
cials of a county having a county auditor  
when so requested by the county court of  
a second class county as provided in  
Section 50.055 RSMo., 1959, or,
2. Is the requirement for a petition  
signed by five per cent. of the qualified  
voters, as set forth in Section 29.230  
Cumulative Supplement 1965 the prevailing  
statute by which this office is empowered  
to make such an audit?
3. If such audit is to be made on the  
request of the county court, will the  
county be obligated for the cost thereof?

"I am enclosing a copy of a resolution passed  
by and certified to this office by the County  
Court of Clay County requesting this depart-  
ment to audit Clay County.

"Your earliest possible attention to this matter  
will be greatly appreciated."



Honorable Haskell Holman

Article IV, Section 13, Constitution of Missouri, provides for the auditing by the State Auditor of the accounts of political subdivisions as provided by law and reads as follows:

"The state auditor shall have the same qualifications as the governor. He shall establish appropriate systems of accounting for all public officials of the state, post-audit the accounts of all state agencies and audit the treasury at least once annually. He shall make all other audits and investigations required by law, and shall make an annual report to the governor and general assembly. He shall establish appropriate systems of accounting for the political subdivisions of the state, supervise their budgeting systems, and audit their accounts as provided by law. No duty shall be imposed on him by law which is not related to the supervising and auditing of the receipt and expenditure of public funds."

Both Section 50.055, RSMo 1959, and Section 29.230, RSMo Supp. 1965, are laws providing for the auditing of second class counties.

Chapter 29, RSMo, provides for the State Auditor. Section 29.230, supra, originally enacted in 1939, now reads in part as follows:

"2. The state auditor shall audit any political subdivision of the state, including counties having a county auditor, if requested to do so by a petition signed by five per cent of the qualified voters of the political subdivision determined on the basis of the votes cast for the office of governor in the last election held prior to the filing of the petition. The political subdivision shall pay the actual cost of audit. No political subdivision shall be audited by petition more than once in any one calendar or fiscal year."

Section 50.055, supra, in the chapter on county finances and budget was originally enacted in 1945 and reads as follows:

"The accounts of the county may be audited, if the county court shall determine such an audit desirable or necessary, every odd numbered year within six months after the termination of the preceding fiscal year, either by a certified public accountant to be employed by the county court or by the state auditor, as said court may determine. If such audit is to be made by the state auditor, the state auditor shall be requested by the county court to make such audit, as provided by law. The audit herein provided shall also review the records of the receipts and disbursements and the property inventory of every officer or office of the county which receives or disburses money on behalf of the county or which holds property belonging to the county. Upon the completion of the investigation, the certified public accountant or the state auditor, as the case may be, shall render a report to the county court at the close of said period, together with a statement showing under appropriate classifications, the receipts and disbursements of the county during said period. The first audit, as provided by this section, may be made following the fiscal year of 1946, and such audit may be made every two years thereafter. The county court shall provide for the expense of such audit, which in no event shall exceed the sum of five thousand dollars, if made by a certified public accountant employed by the county court."

Statutes are in "pari materia" when they are upon the same matter or subject, and the rule of construction in such instances proceeds upon the supposition that the several statutes were intended to be consistent and harmonious in their several parts and provisions. State ex rel. Cairo Bridge Commission v. Mitchell, 352 Mo. 1136, 181 S.W.2d 496, certiorari denied 323 U.S. 772, 89 L.Ed. 617, 65 S.Ct. 131. Statutes in pari materia should be read and construed together in order to keep all provisions of law on the same subject in harmony, so as to work out and accomplish the Legislature's central idea and intent. State ex rel. Lefholz v. McCracken, 231 Mo.App. 870, 95 S.W.2d 1239.

Honorable Haskell Holman

It is our opinion in reading Sections 50.055 and 29.230, supra, that the Legislature intended there be two ways in which the State Auditor can be requested to audit a second class county. One is upon request by five per cent of the qualified voters of the county and the other is upon request by the county court.

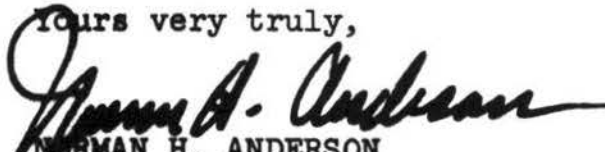
In either event the county must pay for the cost of the audit.

CONCLUSION

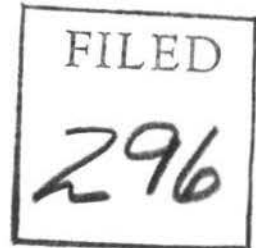
It is the opinion of this office that Section 50.055, RSMo 1959, and Section 29.230, RSMo Supp. 1965, are alternative methods by which the State Auditor can be requested to audit a second class county. If a request is properly made under either statute, the State Auditor must audit the county. In either event the county must pay for the cost of the audit.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

September 11, 1967



**OPINION NO. 296**  
**Answered by Letter**  
**Stevens**

Honorable Gene E. Voigts  
Prosecuting Attorney  
Clay County  
Liberty, Missouri

Dear Mr. Voigts:

We are in receipt of your letter of May 31, 1967, requesting an official opinion from this office, concerning the question whether when the Clay County Election Board makes purchases authorized by Section 119.170 RSMo 1959, when there is a balance in the budget from which payment can be made, the County Court has the ministerial duty to pay for such items after receiving a proper requisition from the Election Board certified by the County Auditor.

Section 119.170, to which you refer, specifically provides that the Board of Election Commissioners may provide supplies necessary to have elections, "subject to the provisions of Section 50.660 RSMo".

Section 50.660 RSMo 1959, in addition to other provisions, provides that all contracts must be certified by the county auditor.

Honorable Gene E. Voigts

We are enclosing a copy of our Opinion No. 9, dated March 23, 1961, directed to Senator Earl R. Blackwell. This opinion sets out the sections of the statutes in question in full and interprets the effect thereof.

Your inquiry asks whether the County Court shall have only the ministerial duty to pay for items upon receiving a proper requisition from the election board properly certified by the county auditor. In other words, the question is whether the court must, as a matter of course, ratify the Board's bills without exercising any independent discretion.

You cite the case of State vs. Matthews, 274 S.W.2d 286, and infer that this case seems to substantiate the view that the County Court must, as a matter of course, ratify the election Board's bills which are presented to them without exercising any discretion on the part of the Court.

The Matthews case that you cite is not determinative of the issue involved here.

In the Matthews case, the St. Louis County Council (the governing body of the County) had refused to pay for voting machines selected by the Board of Election Commissioners.

The Court held that the bid on the machines was rejected "not because it was not the lowest and best bid obtainable \* \*\* but solely because the Council preferred a different type of machine". (l.c. 292).

Section 50.760 provides that it shall be the duty of the judges of the County Court in counties of the second class to determine the kind and quantity of supplies to be paid for out of County funds. The word "determine" has been defined by our Supreme Court in State vs. Bode, 113 S.W.2d 805, 808 as follows:

"The word 'determine' as commonly used, means to conclude, settle, decide and fix."

Sections 50.760 and 50.780 both provide that the County Court must "contract" for supplies. Contract is defined by Black's Law Dictionary, IV Edition, p. 394, as "to enter into an agreement, upon sufficient consideration, to do or not to do a particular thing." Webster's International Dictionary defines "contract" as meaning "to enter into with mutual obligations."

Honorable Gene E. Voigts

By these definitions, it would seem that the County Court would not be acting in a purely "ministerial" manner in approving prospective expenses, or in contracting for supplies, but would be exercising a discretionary function.

It is clearly demonstrated that the intention of the Legislature in promulgating these sections of the statute was to permit the County Court to use its discretion in the exercising of its duties.

This interpretation is further strengthened by the wording of Section 50.780, which gives the judges the right to give preference in the purchase of supplies to local merchants, "provided the price offered is not above that offered elsewhere."

The order of the County Court as provided in Section 50.780 RSMo 1959, could not be interpreted as a "ministerial function" as it is clearly a discretionary act.

It follows that the Board of Election Commissioners of a County of the second class is not authorized by Section 119.170 to make purchases without complying with the provisions of Sections 50.660, 50.760 and 50.780 RSMo 1959.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

OHS/fb

Enclosure - Opinion No. 9, 3-23-61-Blackwell

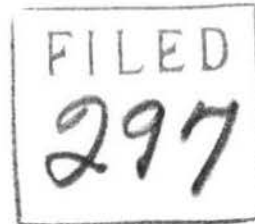


JUVENILE COURT: Prosecuting attorney to furnish legal  
JUVENILE OFFICER: advice to juvenile officer but not par-  
PROSECUTING ATTORNEYS: ticipate in court proceedings.

OPINION NO. 297

August 17, 1967

Honorable Earl R. Blackwell  
State Senator - 20th District  
Missouri Senate  
Capitol Building  
Jefferson City, Missouri



Dear Senator Blackwell:

In your letter of July 2, 1967, you requested an opinion from this office concerning a letter you received from a juvenile officer which reads as follows:

"Our office would like to have an opinion on Juvenile Code 211.411 which states that 'Law enforcement officials to assist and cooperate with juvenile officers' 1. It is the duty of circuit, prosecuting and city attorneys, and county counselors representing the state or a city in any court, to give the juvenile officer such aid and cooperation as may not be inconsistent with the duties of their offices.

"To what extent can we ask the Prosecuting Attorney for his cooperation? In as much as with the new supreme court decision, they recommend that all Juvenile Proceedings become Advisory Proceedings and that the Juvenile Officers case be presented by an attorney on delinquency cases."

We assume the Supreme Court decision to which you refer is Re Gault, 18 L. Ed. 2d 527, decided by the United States Supreme Court May 15, 1967, which in substance holds that the fundamental rights of due process of law apply to juvenile court proceedings in the same manner as it applies to proceedings involving adults.

Section 211.411, RSMo 1959, provides in part:

Honorable Earl R. Blackwell

"1. It is the duty of circuit, prosecuting and city attorneys, and county counselors representing the state or a city in any court, to give the juvenile officer such aid and cooperation as may not be inconsistent with the duties of their offices."

We do not believe this statute conflicts in any manner with the Gault decision and that the provisions of this section are valid.

Section 211.360, RSMo 1949, made it the duty of the prosecuting attorney to investigate and file a complaint or petition in the juvenile court in cases involving neglected or delinquent children. This section was repealed in 1957 and Section 211.411 was enacted. In *State v. Taylor*, 323 S.W. 2d 534, the Springfield Court of Appeals held that the prosecuting attorney was not authorized to file a complaint under the new statute. In discussing the effect of the repeal of Section 211.360 and the enactment of Section 211.411 the court stated, l.c. 537:

"Nowhere in the new act do we find any power or authority in the prosecuting attorney to institute the proceeding. Section 211.360, Laws of 1957, p. 658 (Section 211.411, V.A.M.S.), provides that he, and certain other officers, shall aid and assist the juvenile officer, but it does not purport to re-endow the prosecuting attorney with the powers set forth in the expressly repealed Section 211.360.

"[2,3] It would seem to us that it was the intention of the legislature to take completely away from the prosecuting officers any direct connection with the juvenile proceeding so as to lessen the 'stigma' of being involved in such proceeding. It is our conclusion that, in the words of the eminent authority who reviewed the proposed code while it was yet before the 1957 legislative session:

'Under the proposed act, prosecuting officials are not authorized to institute juvenile court proceedings, and informations and sworn complaints are eliminated. Only the juvenile officer is authorized to start the proceedings.'  
(Our italics)"

Honorable Earl R. Blackwell

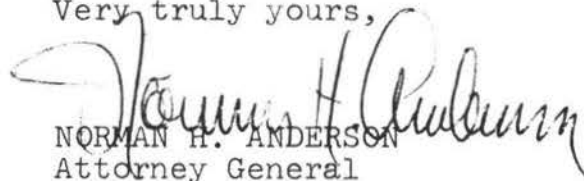
We believe that it was the intention of the legislature when it repealed Section 211.360 and enacted Section 211.411 to completely divorce the prosecuting attorney from actively participating in any juvenile court proceeding. We believe his duties are limited to furnishing legal advice to the juvenile officer concerning the law but not to appear or represent the juvenile officer in the juvenile court. The fact that Section 211.411 also requires the county counselor and city attorney to aid and cooperate with the juvenile officer in the same manner as required by the prosecuting attorney supports this view. Certainly the city attorney and county counselor are not required to represent the juvenile officer in any court proceeding and likewise, it is our opinion that it is no longer the duty of the prosecuting attorney to do so.

#### CONCLUSION

It is the opinion of this office that under Section 211.411, Laws of 1957, p. 642, it is the duty of the prosecuting attorney to furnish legal advice to the juvenile officer but that he is no longer required or permitted to participate in hearings or proceedings before the juvenile court involving neglected or delinquent children.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

ADOPTION:  
JUVENILE COURT:  
NEGLECTED CHILDREN:

Juvenile Court first acquiring jurisdiction over neglected child has exclusive jurisdiction in proceedings to terminate parental control.

OPINION NO. 298

August 17, 1967



Honorable Earl R. Blackwell  
State Senator - 20th District  
Missouri Senate  
Capitol Building  
Jefferson City, Missouri

Dear Senator Blackwell:

In your letter of June 2, 1967, you requested an opinion from this office concerning a letter you received from a Juvenile Officer which reads as follows:

"On December 2, 1963 by Court Order, Child Welfare of Washington County was given custody of a child born out of wedlock. This child was born on April 9, 1963. In order to find a home with proper religious background, they placed this child in a foster home in St. Charles County and have paid for the maintenance of this child continually up to the present time.

"At this time we would like to terminate parental rights. The question that our office would like to have answered is whether we have jurisdiction in Washington County, or whether termination proceedings should be initiated in St. Charles County where the child is living at the present time."

We infer from the letter that the Juvenile Court of Washington County assumed jurisdiction over the child in question in 1963 under the provisions of Chapter 211, RSMo,

Honorable Earl R. Blackwell

and awarded custody of said child to the Child Welfare Agency, and that the Juvenile Court has not relinquished this jurisdiction. You also state that the Child Welfare Agency in Washington County placed the child in a foster home in St. Charles County where apparently the child is now living, and you inquire whether the Juvenile Court of Washington County or the Juvenile Court of St. Charles County has jurisdiction in a proceeding to terminate parental rights. Section 211.011, RSMo 1959, provides:

"1. The purpose of sections 211.011 to 211.431 is to facilitate the care, protection and discipline of children who come within the jurisdiction of the juvenile court. Sections 211.011 to 211.431 shall be liberally construed, therefore, to the end that each child coming within the jurisdiction of the juvenile court shall receive such care, guidance and control, preferably in his own home, as will conduce to the child's welfare and the best interests of the state and that when such child is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to that which should have been given by them."

Reference to Sections (211.011 to 211.431) in the above statute was substituted by the Revisor of Statutes for the words "the purpose of this act" which were in the statute when enacted in 1957, Laws of Missouri 1957, p. 644.

Section 211.041, RSMo 1959, provides:

"When jurisdiction over the person of a child has been acquired by the juvenile court under the provisions of sections 211.011 to 211.431 in proceedings coming within the applicable provisions of section 211.031, the jurisdiction of the child may be retained for the purpose of sections 211.011 to 211.431 until he has attained the age of twenty-one years, except in cases where he is committed to and received by the state board of training schools."

Honorable Earl R. Blackwell

Likewise, the section numbers referred to in this section were substituted by the Revisor of Statutes for the words "when any petition under this act" as it appeared in the above section when it was first enacted in 1957.

Section 211.051, RSMo 1959, states that the provisions of Section 211.011 to 211.431 does not deprive other courts of the right to determine legal custody or guardianship of children when the legal custody is incidental to causes pending in other courts. The statutory sections referred to in this statute are likewise substituted by the Revisor of Statutes for the word "act", as used when this statute was first enacted in 1957.

Section 211.251, RSMo 1959, provides that the orders of the Juvenile Court may be modified at any time on its own motion. Section 211.241, RSMo 1959, authorizes the Juvenile Court to order parents to support the child and provides the method which financial support may be obtained from the parent.

In State v. Mueller, 233 SW 2d 700, the question concerned the adoption of a child by the Juvenile Court of St. Louis County, Missouri, when the jurisdiction over the child had been acquired by the Juvenile Court of Bates County which found that the child was a neglected and abandoned child. The question was whether the fact that the child was under the jurisdiction of the Juvenile Court of Bates County deprived the Juvenile Court of St. Louis County of jurisdiction in an adoption proceeding. Our Supreme Court held that the Juvenile Court of St. Louis did have jurisdiction over the child in an adoption proceeding. In discussing this matter the court referred to the case of State ex rel Dew v. Trimble, 360 Mo. 657, 269 SW 617, and quoted as follows:

"\* \* \*In that case we said:  
'\* \* \*when the juvenile court has in a given case assumed jurisdiction with respect to any such child, its jurisdiction supersedes that of any and all other courts touching the same subject-matter.' (Italics ours) The 'same subject-matter' in that case was the neglected child.

"The 'same subject-matter' before the Bates County Court in the case at bar was the neglected child, while the 'subject-matter' before the respondent is the adoption of the child."



Honorable Earl R. Blackwell

Chapter 211 was amended in 1959 by adding seven new sections dealing with the termination of parental rights of the parents including Section 211.441. (L. 1959, H.B. No. 437 Sec. 1 [Sec. 211.283])

Section 211.441 provides in part as follows:

"1. The juvenile court may, upon petition filed as provided in other cases of children coming under the jurisdiction of the court, terminate all rights of parents to a child when it finds that such termination is in the best interest of the child and one or more of the following conditions are found to exist:

(1) When the parents have consented in writing to the termination of their parental rights.

(2) When it appears by clear, cogent and convincing evidence that for one year or more immediately prior to the filing of the petition

(a) The parents have abandoned the child;

(b) The parents have willfully, substantially and continuously or repeatedly neglected the child and refused to give the child necessary care and protection;

(c) The parents, being financially able, have willfully neglected to provide the child with the necessary subsistence, education or other care necessary for his health, morals or welfare or have neglected to pay for such subsistence, education or other care when legal custody of the child is lodged with others;

Honorable Earl R. Blackwell

- "(d) The parents are unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs or repeated lewd and lascivious behavior, which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the child;
- (e) The parents have been found incompetent under chapter 475, RSMo, and are incapable, and there are reasonable grounds to believe that they will continue to be incapable of giving the child necessary care and protection."

It must be observed that under this section "the juvenile court" may when petition is filed as provided in other cases as children under the jurisdiction of the court terminate the rights of parents when the court finds, after a hearing, that certain conditions regarding the child exist. Under Section 211.501 the court, if certain conditions are found to exist and that the termination of parental rights of the child would be in the best interest of the child, terminate all rights of the parents with reference to the child, and may transfer the guardianship and legal custody of a child to a suitable person or State Division of Welfare or a licensed child welfare agency. These statutory provisions concerning the authority of the court are in general the same as those of the court in proceedings when the court has assumed jurisdiction as provided in Sections 211.011 to 211.431, RSMo 1959.

The statutory provisions that were enacted in 1959 authorizing the Juvenile Court to terminate parental rights have been before the appellate court on three different occasions, none of which involved the question of jurisdiction of the court. The only case that we believe has any probative value on the question at issue is the case of In re Burgess, 359, SW2d 484. In this case the Juvenile Court, after a hearing, terminated the rights of adoptive parents and had transferred the legal custody to the State Division of Welfare. The adoptive father appealed from the decision of the Circuit Court and on appeal the contention was made that the provisions of Section 211.261, RSMo 1959, allowing an appeal to be taken from an order or decree of the Juvenile Court, had no application to proceedings under Section 211.441. In discussing this matter the court pointed out that the Revisor of Statutes in 1959 had changed the wording of Section 211.011 and 211.261 by substituting these section numbers for the word "chapter" or "act". The court

Honorable Earl R. Blackwell

held the Revisor of Statutes had no authority to alter the sense, meaning or effect of any statute in such manner and that the provisions of Section 211.261 enacted prior to the sections that were added in 1959, applied and that the parent had a right to appeal from the order or decree entered under the statutes that were enacted in 1959.


Applying these principles of law to the question at issue, we believe that Chapter 211, RSMo 1959, must be considered as one act with each section read and considered in the light of the other sections, that it should be considered as though all sections were enacted at the same time and that the statutory provisions enacted in 1957 are applicable also to proceedings brought under the sections enacted in 1959 providing for the termination of parental rights unless there is a conflict, in which case no doubt the later enactment would govern. It is our opinion that the Juvenile Court that first acquired jurisdiction over the neglected child under Chapter 211 retains jurisdiction over the child for the purpose of terminating parental control. Proceedings for the termination of parental control primarily involve the same issues that the Juvenile Court has to consider when it takes jurisdiction over an abandoned or neglected child under Sections 211.010 to 211.431 and it involves the same "subject-matter". State v. Mueller, supra.

#### CONCLUSION

It is the opinion of this department that the Juvenile Court which first acquires jurisdiction over a child under Chapter 211, RSMo 1959, has exclusive jurisdiction of said child in proceedings brought for the termination of parental rights unless and until such jurisdiction is terminated by the Juvenile Court first acquiring jurisdiction.

The foregoing opinion, which I hereby approve, was prepared by my Assistant Moody Mansur.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

CONSTITUTIONAL CHARTER CITIES:  
EASEMENTS:  
CONDEMNATION:  
ELECTRICAL POWER PLANTS:

The City of Columbia, Missouri, cannot lawfully acquire by purchase or condemnation title to property in Cooper County for the purpose of erecting and maintaining electrical power transmission lines.

OPINION NO. 299

November 21, 1967

Honorable A. Basey Vanlandingham  
State Senator  
12 Glennview Plaza  
Box 711  
Columbia, Missouri 65201



Dear Senator Vanlandingham:

This is in answer to your request for an opinion of this office, which request reads as follows:

"The City of Columbia, Missouri has issued bonds for the purpose of paying all or part of the cost of extending and improving its revenue-producing water and light works, under Section 27, Article 6 of the Constitution of Missouri, 1945.

"The City of Columbia desires to purchase electric power from the Union Electric Company at the Overton, Missouri Sub-Station of the Union Electric Company in Cooper County, about four miles west of the Boone County line.

"The City of Columbia further desires to acquire easements and construct, operate and maintain its own transmission line from Columbia to said Overton Sub-Station in Cooper County.

"Would you please render an opinion as to whether the City of Columbia, Missouri may legally condemn, purchase or hold title to property or easements thereon in Cooper County and outside the corporate limits of Columbia and construct, control, maintain and police its transmission lines thereon?"

Senator A. Basey Vanlandingham

We note that Columbia, Missouri, is a constitutional charter city under the authority of Article VI, Section 19, Constitution of Missouri.

Section 82.010, RSMo 1959, reads as follows:

"1. Any city of this state framing and adopting a charter for its own government, whether under the provisions of section 19, article VI of the constitution of 1945, or under the provisions of section 16 or section 20, article IX of the constitution of 1875, is hereby defined and declared to be a constitutional charter city.

"2. All laws now existing or which may hereafter be enacted relating or making reference to cities under constitutional charter or constitutional charter cities, shall be deemed to and shall apply and be valid only in relation to cities of this state defined and declared in this section to be cities under constitutional charter."

Section 91.010, RSMo 1959, gives the City of Columbia the power to erect and operate its own electrical power plant. This section reads as follows:

"The city council of any city, town or village in this state shall have power to erect, maintain and operate water works, or to acquire waterworks by purchase and to operate and maintain the same, and to supply the inhabitants thereof with water; to erect, purchase, acquire, maintain and operate gas and power plants, electric light plants, ice plants or any other kind of plant, or device for lighting purposes, or to acquire and own the same by purchase and to maintain and operate such plants and supply the inhabitants of such cities, towns and villages with water, light, ice and power therefrom."

You have informed us that Columbia does own and operate its own plant.

Section 82.240, RSMo 1959, relating to constitutional charter cities authorizes such cities to provide in their charters that such cities shall have the power to acquire land for public use. This section reads as follows:

"It shall be lawful for any such city to make provision in its charter, or by amendment thereof,

Senator A. Basey Vanlandingham

to acquire and hold by gift, devise, purchase or by the exercise of the power of eminent domain by condemnation proceedings, lands for public use, either within the corporate boundaries of such city or outside of such corporate boundaries, and within the territorial limits of the county in which such city may be situated, for public parks, cemeteries, penal institutions, hospitals, right of ways for sewers, or for any other public purpose, and to provide for managing, controlling and policing the same."

This section, then, limits the power of a constitutional charter city lawfully to provide in its charter for acquisition of land for an electrical power plant to territory within the county in which the city is located. Accordingly, it is our opinion that the City of Columbia, Missouri, cannot acquire by purchase or condemnation title to property in Cooper County for the purpose of erecting and maintaining electrical power transmission lines.

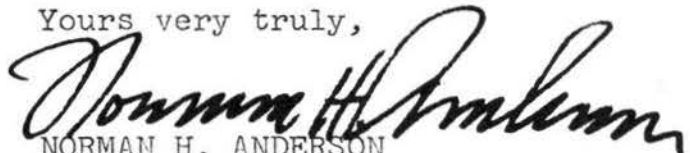
We have been referred to Section 91.570, RSMo Supp. 1965, but find that that section relates only to special charter cities having less than ten thousand inhabitants. Section 91.560, RSMo 1959. Therefore, that section is not applicable to Columbia, Missouri.

#### CONCLUSION

It is the opinion of this office that the City of Columbia, Missouri, cannot lawfully acquire by purchase or condemnation title to property in Cooper County for the purpose of erecting and maintaining electrical power transmission lines.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General



SOIL AND WATER CONSERVATION  
SUBDISTRICTS:  
STATE AGENCIES:

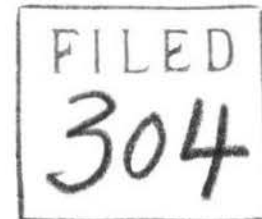
(1) Soil and water conservation subdistricts organized under the provisions of Chapter 278, RSMo, to carry out watershed protection and flood prevention purposes and to further conservation and utilization of water

for additional purposes including recreation, irrigation and wild-life development, have implied power to construct dams across non-navigable streams to achieve the ends for which the subdistricts are created; (2) Such soil and water conservation districts are governmental agencies of the state and do not come within the purview of Chapter 236 RSMo, which requires private persons or corporations to obtain permission of the circuit court to build dams for mills, electric power or other machinery; (3) Any damage to the riparian rights of downstream landowners from the construction of dams by soil and water conservation subdistricts would be consequential and result from the proper exercise of the police power of the state and be damnum absque injuria.

OPINION No. 304

August 22, 1967

Mr. Lee E. Norbury  
Assistant Executive Secretary  
Missouri State Soil and Water  
Districts Commission  
T-7 Bldg. University of Missouri  
Columbia, Missouri



Dear Mr. Norbury:

This is in response to your request for an opinion of this office on the following questions:

"1. Is it necessary for watershed subdistricts organized under the provisions of Chapter 278 RSMo to file a petition for permission under the provisions of Chapter 236 RSMo to construct a dam for flood prevention purposes?

2. If the answer is 'no' then do the provisions of Chapter 236 RSMo apply if additional purposes are included such as recreation, irrigation, wildlife development, etc.?

Mr. Lee E. Norbury

"3. If these structures are constructed across intermittently flowing streams what is the riparian position of those landowners downstream from the structure?"

Chapter 278, RSMo, is entitled "Soil Conservation", and Chapter 236, RSMo, is entitled "Dams, Mills and Electric Power". We have, therefore, two acts of the legislature which must be considered with respect to construction of dams across non-navigable streams. Section 278.120, RSMo Cum. Supp. 1965, is as follows:

"1. Any soil and water district organized under the provisions of this law shall be a body corporate and shall possess only such powers as herein provided, but any such powers possessed by said body corporate shall be particularly limited by the following provisos; provided, that the private property of any land representative or owner of property in such soil and water district shall be exempt from execution for the debts of the body corporate or soil and water district and no land representative or owner of property within said soil and water district shall be liable or responsible for any debts of the body corporate or soil and water district, and provided further, that no property of any character, title to which is not vested in said soil and water district, or a soil and water district as the case may be, shall ever be subject to any lien for any claim or judgment of or against said district, or a soil and water district as the case may be. Any soil and water district so organized shall be officially known and titled "The Soil and Water District of . . . . . County", and shall be so designated by the county court by order of record, and in that name shall be capable of suing and being sued and of contracting and being contracted with.

"2. A soil and water district through the board of soil and water district supervisors thereof shall have the following authority and duty in addition to other authority and duty granted in other sections of this law:

Mr. Lee E. Norbury

(1) To promote all reasonable measures for the saving of the soil and water within that soil and water district; and all such measures shall be in general agreement with those currently advocated by the college of agriculture of the University of Missouri for saving the productive power of Missouri farm land;

(2) To cooperate or enter into agreements with, and to aid within the limits of appropriations duly made available to it by law, any agency, government or otherwise, or any land representative within that soil and water district, in the saving of the soil and water within that district; and all such cooperations or agreements shall be in accord with the policies of the state soil and water districts commission; and any land representative of farm land within that soil and water district shall be eligible to enter into such cooperations or agreements with the soil and water supervisors; and no program or procedure of soil and water conservation shall be ordered or executed by the soil and water supervisors on any farm without the full consent and agreement of the land representative of that farm;

(3) To make available to any land representative within that soil and water district, through existing agencies if agreements with them seem feasible, or by such other feasible means as the supervisors shall prescribe, such services, materials, and equipment as will assist such land representatives to carry on operations for the saving of the soil and water;

(4) To accept grants, gifts, and contributions in money, services, or materials from the United States or any of its agencies, and to use or expend such grants, gifts or contributions in carrying on the soil and water district operations; and such use or expenditure shall be in accord with the policies of the state soil and water districts commission;

Mr. Lee E. Norbury

(5) To make and execute contracts and other legal instruments, necessary for the saving of the soil and water in that district, subject to approval by the state soil and water district commission;

(6) To accept for the purpose of saving soil and water in that district, contributions in money, services or materials from any source not otherwise provided for herein, and to enter into such agreements with land representatives as will tend to prevent future wastage of the soil and water presently benefited by these contributions."

Section 278.160, RSMo Cum. Supp, 1965, authorizes the formation of soil and water conservation subdistricts, as follows:

"Subdistricts of a soil and water conservation district may be formed as hereinafter provided for the purpose of carrying out watershed protection and flood prevention programs for the prevention of floodwater and sediment damage and for furthering the conservation, development, utilization and disposal of water, and for increasing recreation, the supply of water, industrial development and agricultural water management, including fish and wildlife and recreational development."

In Hudgins v. Mooresville Consol. School Dist., 278 S. W. 769, 771, the court states " \* \* \* that a power granted carries with it, incidentally or by implication, powers not expressed, but necessary to render effective the one expressed." The authority of the subdistrict to construct dams necessary to effectuate the purposes of Section 278.160, is implicit in the language of this section.

Your first question is whether the legislature intended to condition the authority granted to the subdistrict on approval of the circuit court to build dams pursuant to Chapter 236. Section 236.010, RSMo, is as follows:

"Any person or corporation chartered and organized to construct, operate and maintain mills, electric power and light works, or other machinery, may

Mr. Lee E. Norbury

erect a dam across any watercourse, not being a navigable stream, if such person or corporation is the proprietor of the land through which the watercourse runs at the point where it is proposed to erect such dam, by proceeding as herein provided."

Section 236.030, RSMo, provides:

"In the case supposed in section 236.010, the person or corporation proposing to erect a dam shall file a petition in the circuit court of the county in which it is proposed to erect such mill, electric power and light works, or other machinery, in connection with the dam, and shall therein set forth:

(1) A description of the land and an abstract of the title thereto;

(2) The name of the watercourse, and a description of the point at which it is proposed to erect such dam;

(3) The altitude of the dam which it is proposed to erect; and

(4) The kind of mill, electric power and light works, or other machinery, which it is proposed to connect with the dam.

Section 236.270, states:

"Any person who shall build or heighten any dam, or any other stoppage or obstruction on or across any watercourse, without first obtaining permission from the court of the proper county, according to law, and shall thereby work any injury to any other person, shall forfeit to the party injured double damages for such injury, to be recovered by civil action."

Mr. Lee E. Norbury

In Rector v. Tobin Construction Company, 351 S.W. 2d 816, the court quoted Section 236.270 and stated:

"[8-10] The plaintiffs claim that they are entitled to double damages by virtue of Section 236.270 RSMo 1949, V.A.M.S. This section provides: 'Any person who shall build or heighten any dam, or any other stoppage or obstruction on or across any watercourse, without first obtaining permission from the court of the proper county, according to law, and shall thereby work any injury to any other person, shall forfeit to the party injured double damages for such injury, to be recovered by civil action.'

This section is part of Chapter 236, bearing the title 'Dams, Mills and Electric Power'. The chapter dates back in part to the territorial laws of 1822, and it contains a special procedure for obtaining permission to dam watercourses. The very obvious purpose of the original act was to promote the construction of mills and to protect the owners of land along the watercourse from any damage that they might suffer because of the construction."

It is to be observed that Chapter 236, prescribes the conditions under which private persons or corporations may construct dams to obtain power for the operation of machinery. The permission of the circuit court is required for the construction of such dams, but only a person or corporation chartered and organized "to construct, operate and maintain mills, electric power and light works, or other machinery," is entitled to obtain the required permission. It appears therefore, that the subject matter and purpose of Chapter 236 which, under the conditions specified, authorizes the construction of dams by private persons or corporations, is quite different from the subject matter of Chapter 278, which authorizes the construction of dams for flood prevention purposes only by agencies of the state.



Mr. Lee E. Norbury

Article X, Section 15, of the Constitution of Missouri states:

"Definition of 'other political subdivision.' - The term 'other political subdivision,' as used in this article, shall be construed to include townships, cities, towns, villages, school, road, drainage, sewer and levee districts and any other public subdivision, public corporation or public quasi-corporation having the power to tax."

Paragraph 4, of Section 278.250, RSMo Cum. Supp. is as follows:

"4. The governing body of each soil and water conservation district containing a subdistrict or a portion thereof shall make the necessary millage levy on the assessed valuation of all real estate within the boundaries of the subdistrict lying within their respective district to raise the needed amounts, but in no event shall the levy exceed four mills on each one dollar of assessed valuation per annum and, on or before the first day of September of each year, shall certify the rate of levy to the county court of the county within which the district is located with directions that at the time and in the manner required by law for the levy of taxes for county purposes the county court shall levy a tax at the rate so fixed and determined upon the assessed valuation of all the taxable property within the subdistrict, in addition to such other taxes as are levied by the county court."

It appears, therefore, that soil and water conservation subdistricts have the power to impose taxes and are agencies of the state. In Hayes v. City of Kansas City, 241 S.W. 2d 888, the court quotes with approval the following from 59 C.J., Sec. 653:

Mr. Lee E. Morbury

"6. 'The state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication. This general doctrine applies with especial force to statutes by which prerogatives, rights, titles, or interests of the state would be divested or diminished; or liabilities imposed upon it; but the state may have the benefit of general laws, and the general rule has been declared not to apply to statutes made for the public good, the advancement of religion and justice, and the prevention of injury and wrong.'"

Under this rule of law it is clear that soil and water conservation subdistricts organized under the provisions of Chapter 278, are not within the purview of Chapter 236, and the provisions of Chapter 236 impose no liability on such subdistricts to obtain permission of the circuit court to construct dams for flood prevention purposes.

This conclusion also applies to your second question.

Section 278.160, RSMo, as originally enacted in 1957, was limited to "carrying out watershed protection and flood prevention programs; for the prevention of flood water and sediment damage and for furthering agricultural phases of the conservation, development, utilization, and disposal of water within the sub-district." However, in 1963 Section 278.160 was amended and expanded to include "and for furthering the conservation, development, utilization and disposal of water, and for increasing recreation, the supply of water, industrial development and agricultural water management, including fish and wildlife and recreational development."

In this amendment the legislature expressly authorized the formation of subdistricts for additional purposes, including irrigation, wildlife development and recreational purposes. When the construction of dams is an appropriate means to carry

Mr. Lee E. Norbury

out the purpose of the amendment, the authority to construct such dams is implied in the same manner and to the same extent as is the authority to construct dams for flood-prevention purposes.

This brings us to your third question concerning the riparian position of those landowners downstream from the structure:

In Bollinger v. Henry, 375 S.W. 2d 161, 166, the court pointed out that the rights of a riparian owner in the waters of a stream include "'the right to the flow of the stream in its natural condition in respect of both volume and purity, except as affected by reasonable use by other proprietors,'".

Inasmuch as a dam will reduce the natural flow and depth of a stream, and may to some extent impair the riparian rights of the downstream landowners, the question presented is whether such impairment constitutes damage that comes within the constitutional provision that private property shall not be taken for public use without just compensation.

The subdistricts are governmental agencies of the state. In constructing the dams, they are performing a public duty imposed by the legislature. The dams, therefore, are constructed by authority of the state in the exercise of its police power.

Drainage laws are closely akin to the soil conservation laws and in drainage cases the courts have held that governmental agencies employed in this exercise of the police power are to be classed with counties, road districts and school districts. In Sigler v. Inter-River Drainage Dist., 279 S.W. 50, 56, the court said:

"[1,2] The fundamental question in this case is that of whether the plaintiffs' property was damaged within the meaning of the Constitution. It cannot be denied, and is conceded by the plaintiffs, that the creation and exercise of the functions of the drainage districts in this state is an exercise of the police power of the state. It is settled too that such a district is a governmental agency, exercising only public governmental functions, and, as such, to be classed with counties, road districts, and

Mr. Lee E. Norbury

school districts. Morrison v. Morey, 146 Mo. 543, 48 S.W. 629; Land & Stock Co. v. Miller, 170 Mo. 240, 70 S.W. 721, 60 L.R.A. 190, 94 Am. St. Rep. 727; Wilson v. Drainage District, 257 Mo. 266, 165 S.W. 734; State ex rel. McWilliams v. Little River Drainage District, 269 Mo. 444, 190 S.W. 897; State ex rel. Caldwell v. Drainage District, 291 Mo. 72, 236 S.W. 15; State ex rel. Hausgen v. Allen, 298 Mo. 448, 250 S.W. 905; Anderson v. Inter-River Drainage District (Mo. Sup.) 274 S.W. 448."

In the construction of the dams in question the subdistrict will not encroach upon the lands downstream from the structures, there will be no actual and physical taking or damage of such property, or enforced occupation thereof, or interference therewith, or the exercise of any proprietary functions in relation thereto. Any damage that may result to downstream landowners would be indirect, incidental and consequential, and is damnum absque injuria. Gagnepain v. Levee Dist. No. 1, 7 S.W. 2d 285, 287, par. 4, states:

"[4] The damage results from an exercise of the police power of the state acting through an agency created by statute and called a drainage district. It was necessary to construct the levee to achieve the end for which the district was created, namely to protect the public health and promote the general welfare of the state. The statute expressly authorized the construction of the levee and the damming or changing of water courses. The district's acts were consequently lawful. There is no charge that the plan used by the district was arbitrary or unreasonable. It was the only method that could be used. A lawful exercise of the police power must meet with uncompensated obedience, although injury result therefrom. Such an injury is not a taking nor damaging within the meaning of the Constitution. The interest of the individual must always give way to the greater good that will result from a reasonable exercise of the police power. All property is held subject to its proper exercise by the state.

Mr. Lee E. Norbury

The function of these drainage districts is purely governmental and not private in character. Hence, being purely an injury resulting from a proper and reasonable exercise of the police power by the state, the injury resulting is not within the constitutional limitation. C., B. & Q. R. R. v. Illinois, 200 U. S. 561, 26 S. Ct. 341, 50 L. Ed. 596, loc. cit. 604-610, 4 Ann. Cas. 1175; Gibson v. United States, 166 U. S. 269, 17 S. Ct. 578, 41 L. Ed. 996.

We do not know from this petition whether due notice or hearing of the plan was given by the district, nor are we concerned with the rights these plaintiffs there had or could have invoked had they attempted to do so. The petition alleges the organization of the district and its building of the levee according to plans adopted. The damages are not for the taking of private property, but a damage which is consequential to the construction of the levee in this road along the Mississippi river. The damages are purely consequential and no liability therefore exists to landowners either within or without the district. So is the law now written, and we follow it."

#### CONCLUSION

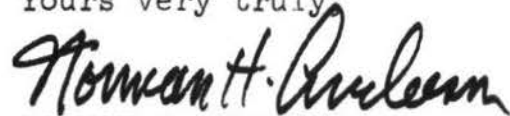
It is the opinion of this office that (1) Soil and water conservation subdistricts organized under the provisions of Chapter 278, RSMo, to carry out watershed protection and flood prevention purposes and to further conservation and utilization of water for additional purposes including recreation, irrigation and wildlife development, have implied power to construct dams across nonnavigable streams to achieve the ends for which the subdistricts are created; (2) Such soil and water conservation districts are governmental agencies of the state and do not come within the purview of Chapter 236, RSMo, which requires private persons or corporations to obtain permission of the circuit court to build dams for mills, electric power or other machinery; (3) Any damage to the riparian rights of downstream landowners from the construction of dams by soil and

Mr. Lee E. Norbury

water conservation subdistricts would be consequential and result from the proper exercise of the police power of the state. Such damage is damnum absque injuria and does not come within the constitutional provision that private property shall not be taken for public use without just compensation.

The foregoing opinion, which I hereby approve, was prepared by my Assistant L. J. Gardner.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Norman H. Anderson", written in a cursive style.

NORMAN H. ANDERSON  
Attorney General



August 22, 1967

FILED  
307

Hon. James R. Hall  
Prosecuting Attorney  
of Ripley County  
106 Court House Square  
Doniphan, Missouri 63935

Dear Mr. Hall:

You request an opinion in the following terms:

"A businessman wrote a check, either for goods sold, or on account, and the check proved to be drawn on an account which had not sufficient funds to pay the check. Thereafter, and prior to criminal prosecution, the businessman filed a federal bankruptcy petition, listing therein the debt owed to the payee on the check. The opinion sought is: 'Does the bankruptcy petition constitute an absolute defense against a present action for an insufficient funds check under 561.460?'"

The essence of the crime mentioned is the intent to defraud. If the intent is present, the man may be prosecuted regardless of subsequent events, see State vs. Euge, 349 S.W. 2d 502.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

MARRIAGE: The statutory prohibitions against interracial  
MISCEGENATION: marriages as set forth in Section 451.020, RSMo  
Supp. 1965, and Section 563.240, RSMo 1959, are  
unconstitutional.

OPINION NO. 308 (1967)

July 6, 1967

Honorable Forrest P. Carson  
Chairman  
Missouri Commission on Human Rights  
314 East High Street  
Jefferson City, Missouri



Dear Mr. Carson:

This official opinion is issued in response to your request for a ruling. You inquire as to whether Section 451.020, RSMo Supp. 1965, and Section 563.240, RSMo 1959, are unconstitutional.

These statutes prohibit interracial marriages and are commonly referred to as antimiscegenation statutes. The relevant provisions of Section 451.020, read as follows:

"All marriages between . . . white persons and negroes or white persons and Mongolians . . . are prohibited and declared absolutely void; and it shall be unlawful for any city, county or state official having authority to issue marriage licenses to issue such marriage licenses to the persons heretofore designated, and any such official who shall issue such licenses to the persons aforesaid knowing such persons to be within the prohibition of this section shall be deemed guilty of a misdemeanor; and this prohibition shall apply to persons born out of lawful wedlock as well as those in lawful wedlock."

Section 563.240, provides:

"No person having one-eighth part or more of negro blood shall be permitted to marry any white person, nor shall any white person be permitted to marry any negro or person having one-eighth part or more of negro blood; and every person who shall knowingly marry in violation of the provisions of this section shall, upon conviction, be punished by imprisonment in the penitentiary for two years,

Honorable Forrest P. Carson

or by fine not less than one hundred dollars, or by imprisonment in the county jail not less than three months, or by both such fine and imprisonment; and the jury trying any such case may determine the proportion of negro blood in any party to such marriage from the appearance of such person."

On June 12, 1967, the Supreme Court of the United States handed down its opinion in the case of Loving et ux. vs. Commonwealth of Virginia, No. 395.--October Term, 1966. The appellants, Mr. and Mrs. Loving, had been sentenced for violating Virginia statutes banning interracial marriages. The Court held the Virginia statutes as unconstitutional and void.

Two of the Virginia statutes before the Court read as follows:

"All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process." Virginia Code Annotated, Section 20-57 (1966).

"If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one year nor more than five years." Virginia Code Annotated, Section 20-59.

The Missouri statutes, quoted above, and the Virginia statutes ruled upon by the Court are, in all material aspects, the same. Further, it is to be noted that the United States Supreme Court took cognizance of the Missouri statutes and those of the fourteen other states with such statutes.

What the Court said in ruling upon the Virginia statutes clearly strikes down all antimiscegenation statutes. The Court stated:

"There is patently no legitimate overriding purpose independent of invidious racial discrimination which justified this classification . . . . There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

Honorable Forrest P. Carson

\* \* \* \* \*

" \* \* \* The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

"Marriage is one of the 'basic civil rights of man' fundamental to our very existence and survival . . . . To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive to the principles of equality at the heart of the Fourteenth Amendment, is surely to deprive all of the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."

#### CONCLUSION

Therefore, it is the opinion of this office that the statutory prohibitions against interracial marriages as set forth in Section 451.020, RSMo Supp. 1965, and Section 563.240, RSMo 1959, are unconstitutional.

The foregoing opinion, which I hereby approve, was prepared by my assistant Louis C. DeFeo, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

MARRIAGE: Rabbis have the power and authority to solemnize marriages  
RABBIS: in this state.

OPINION NO. 309

July 12, 1967

Honorable Kenneth J. Rothman  
State Representative - District 36  
St. Louis County  
Missouri House of Representatives  
Capitol Building  
Jefferson City, Missouri



Dear Representative Rothman:

This is in response to your request for an opinion from this office, which request states:

"I respectfully request an opinion of the Attorney General on the question of whether, under §451.100, RSMo 1959, or any other section of the revised statutes, a rabbi is authorized to solemnize marriages."

Section 451.100, RSMo 1959, pertains to those persons authorized by law to solemnize marriages and states:

"Marriages may be solemnized by any licensed or ordained preacher of the gospel, who is a citizen of the United States, or who is a resident of this state and a pastor of any church in this state, or by any judge of a court of record, except judges of the probate court."

A general rule in statutory interpretation is to seek the legislative intent from the words used and ascribe to these words a plain and rational meaning. Missouri Digest, Vol. 26, Statutes, Section 180.

76 C.J.S., Religious Societies, Section 39, page 794, defines "a minister of the gospel" as a:

Honorable Kenneth J. Rothman

"\* \* \*spiritual teacher, and, within the meaning of the marriage acts requiring one to be such before he can be licensed to marry, the term is construed broadly to refer to ministers of any form of religion or faith."  
(Emphasis added.)

76 C.J.S., supra, defines an "ordained minister" as:

"\* \* \*one consecrated to the ministry by some act of admitting and setting apart. In general acceptation a duly ordained minister is one who has followed a prescribed course of study of religious principles, has been consecrated to the service of living and teaching that religion through an ordination ceremony of an established church by which he has been commissioned, and who is subject to the control and discipline of the church by which he was ordained. Within the meaning of the marriage acts requiring one licensed to marry to be an 'ordained minister', the term is not confined to the Christian ministry." (Emphasis added.)

Applying a natural and reasonable interpretation to the language found in Section 451.100, supra, it is the opinion of this office that the term Rabbi was intended by the Legislature to be included in the meaning of "licensed or ordained minister of the gospel" and, therefore, a Rabbi is authorized by Section 451.100, supra, to solemnize marriages.

#### CONCLUSION

It is the opinion of this office that Rabbis have the power and authority to solemnize marriages in this state.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Gerald L. Birnbaum.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General



November 2, 1967

OPINION NO. 310  
Answered by Letter  
(Louren R. Wood)

Major General L. B. Adams, Jr.  
Adjutant General of Missouri  
Broadway State Office Building  
Jefferson City, Missouri

Attention: Karl Bennett



Re: Warrenton Armory-  
Missouri Edison Company

Dear General Adams:

In your letter of June 16, 1967, you have inquired whether or not you have the legal authority to grant an easement to the Missouri Edison Company for the running of a pipeline across Armory property in Warrenton, Missouri.

The Adjutant General has no existing authority to convey state owned land or any interest therein. Only the General Assembly of Missouri may do this. The construction of a natural gas pipeline in or across land can hardly be considered less than an easement, and thus an interest in land. We understand that the Missouri Edison Company has already constructed its pipeline across the Warrenton Armory land. Since Missouri Edison was without any legal right to do this, it is now a trespasser on state land. However, we trust that Missouri Edison will make every effort to secure legislative authorization for the pipeline from either the Seventy-fourth or Seventy-fifth General Assembly of Missouri. The decision whether the utility shall be allowed to

Major General L. B. Adams, Jr.

keep such pipeline laid across Armory property until an easement is granted by the Legislature is a matter to be determined by the Adjutant General.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

LRW:ms

June 20, 1967

State Board of Education  
Mr. Hubert Wheeler,  
Commissioner of Education  
Jefferson Building  
Jefferson City, Missouri



Gentlemen:

Per your request we have reviewed the Missouri Application No. 1, FY 1968 for a federal grant to strengthen Missouri State Department of Education under Title V, P.L. 89-10.

We hereby certify that the Missouri State Board of Education is the Agency of the State of Missouri primarily responsible for state supervision of public Elementary and Secondary Schools and is the Agency most nearly meeting the definition of "State Educational Agency" in Section 601(k) of P.L. 89-10, and that the State Board has the authority under state law to submit and administer the programs, projects and activities set forth in the state application, and that all the provisions of the application are consistent with state law.

We return herewith the original and two copies of the application duly executed by this office.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

By Louis C. DeFeo, Jr.  
Assistant Attorney General

Enclosures

ELEMENTARY AND SECONDARY  
EDUCATION ACT: ✓  
STATE BOARD OF EDUCATION: ✓  
FEDERAL GRANTS: ✓

Review and certification of State Board's application for program grant to provide educational programs for migratory children of migratory agricultural workers under Title I, Public Law 89-10 as amended by Section 103, Public Law 89-750.

Opinion No. 313  
Answered by Letter (DeFeo)

June 21, 1967

Honorable Hubert Wheeler  
Commissioner of Education  
Jefferson Building  
Jefferson City, Missouri



Dear Commissioner Wheeler:

Per your request we have reviewed the Missouri State Department of Education application for a program grant (Title I, Public Law 89-10 as amended by Public Law 89-750) for the establishment or improvement of educational programs for migratory children of migratory agricultural workers.

We note that the program as presently drafted provides for the establishment of a student records and special services center, the conducting of teacher workshops and conducting of a summer school for migratory children. These functions are to be performed by contract with Southeast Missouri State College and the Gideon Public School District. Without deciding, we note that there is doubt as to the authority of the State Board of Education to carry out these functions either directly or by contract.

Article III, Section 38a, Missouri Constitution, provides:

"Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States."

Under Section 161.092(2), RSMo Supp. 1965, the State Board of Education has the duty to:

"Carry out the educational policies of the state relating to public schools that are provided by law and supervise instruction in the division of public schools;"

Honorable Hubert Wheeler

We believe the foregoing to authorize the State Board of Education to receive the federal grants available under Section 103, P.L. 89-750, and to regrant or redistribute the federal funds for the purposes of the federal law.

Therefore, we recommend that the functions to be performed by Southeast Missouri State College and the Gideon Public School District be performed under a grant award upon appropriate conditions and assurances and that the provision for contracting for services in the state application be deleted. We will by separate letter recommend an appropriate grant award form.

Upon your assurances that the state application will be amended per our recommendations we hereby certify that the State Board of Education of the State of Missouri has authority under state law to perform the duties and functions of a state educational agency as defined under Title I, of P.L. 89-10, including those functions arising from the assurances set forth in the application for a grant for educational programs for migratory children of migratory agricultural workers and that the State Board of Education has authority to submit and administer special educational programs and projects for migratory children as set forth in the application.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

By Louis C. DeFeo, Jr.  
Assistant Attorney General

LCD:df

September 28, 1967

OPINION NO. 315  
Answer by Letter-Denman

Honorable Thomas R. Gilmore  
Assistant Prosecuting Attorney  
Scott County  
Sikeston, Missouri 63801



Dear Mr. Gilmore:

This is in answer to your question as to the advisability of proceeding with a prosecution against a person charged with operating a motor vehicle licensed as a "local commercial motor vehicle" out of the geographical limits authorized by Section 301.010(10), RSMo.

This subsection defines a local commercial vehicle as follows:

"a commercial motor vehicle whose operations are confined solely to a municipality and that area extending not more than twenty-five miles therefrom; or a commercial motor vehicle whose property carrying operations are confined solely to the transportation of property owned by any person who is the owner or operator of such vehicle, to or from a farm owned by such person or under his control by virtue of a landlord and tenant lease; provided that any such property transported to any such farm is for use in the operation of such farm;"

The facts giving rise to the charge, you state to be as follows:

"The defendant owns several trucks and was charged for operating one of his trucks outside the geographical limits for which it was licensed. The truck had a 'local' Missouri truck license. The defendant had an arrangement with a farmer near Perryville, Missouri by which the defendant would provide all of the labor and operating



expenses necessary to cut and bale hay on this man's farm. The defendant was also to truck the hay wherever necessary in order to market it. The defendant and the farmer were to split all the proceeds on a 50-50 basis. The defendant was under the impression that since he was involved in a joint farming operation with this farmer, he was entitled to transport this hay under his local license by virtue of the definition in Sec. 301.010(10). Reading this part of the Statute literally, it would appear the defendant is not covered by the strict language which reads 'to or from a farm owned by such person or under his control by virtue of a landlord and tenant lease'."

We have no previous rulings on your question and find no cases directly in point. Since this question is one which is now pending before the court, it is the policy of this office in such circumstances not to issue an official opinion on the subject. However, it is our position, based upon the facts you have given, that you should proceed with prosecution on the charge now pending.

Under these facts it does not appear that the vehicle in question was being operated in accordance with the definition of a local commercial vehicle. The farm is not owned by the owner of the truck, and an arrangement whereby the truck owner agreed to cut and bale the farmer's hay and transport it to wherever necessary in order to market it in payment for 50% of the proceeds does not constitute a landlord and tenant relationship. There is also some doubt as to whether the arrangement would vest ownership of the hay in the truck owner sufficient to convert the hay into "property owned" by the owner of the vehicle as required by Section 301.010(10).

The registration fee for "local" commercial vehicles is substantially less than that for regular commercial vehicles. Section 301.060, RSMo Supp. 1965. This partial exemption from payment of registration fees may be compared to exemptions from taxes given religious, charitable and educational institutions under certain specified conditions. It is well settled in such cases, that the provisions of the exempting statutes must be strictly yet reasonably construed, and the burden is on the taxpayer to show that he is entitled to the exemption claimed. In re First National Safe Deposit Co., Mo.Banc 173 S.W.2d 403; Bethesda Naval Hospital v. State Tax Commission, Mo.Sup., 381 S.W.2d 772; State ex rel St. Louis Y.M.C.A. v. Gehner, Mo.Sup., 11 S.W.2d 304.

The statutory definition of a "local commercial vehicle" is "confined solely" to vehicles operated in conformance with the provisions therein, and construing these provisions strictly as we believe

Honorable Thomas R. Gilmore

they should be, in our opinion the state should take the position that the truck in question was not being operated within its authority as a "local commercial vehicle", and you should proceed with the prosecution on this charge.

Very truly yours,

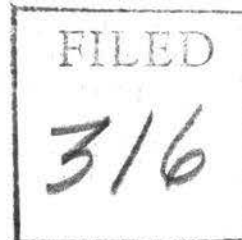
NORMAN H. ANDERSON  
Attorney General

JHD:maw

July 18, 1967

**OPINION NO. 316**  
Answered by letter-DeFeo

State Board of Education  
Hubert Wheeler, Commissioner  
of Education  
Jefferson Building  
Jefferson City, Missouri



Gentlemen:

Per your request we have reviewed the Missouri application No. 2 FY 1968 for a federal grant to strengthen the Missouri State Department of Education under Title 5 P.L. 89-10.

Because of your need to meet fiscal year deadlines, we executed the certification for this application on June 28, 1967, based upon a preliminary review of the application. We have subsequently had opportunity to review completely the application and by this letter reaffirm our certification that Missouri State Board of Education is the agency of the State of Missouri primarily responsible for state supervision of public, elementary and secondary schools and is the agency most nearly meeting the definition of "state educational agency in Section 601 (k) of P.L. 89-10 and that the state board has the authority under state law to submit and administer the programs, projects and activities set forth in the state application and that all the provisions are consistent with state law."

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

---

Louis C. DeFeo, Jr.  
Assistant Attorney General

LCD:man

COUNTIES: Counties of the first and second class may  
COUNTY COURTS: adopt building codes which include provisions  
BUILDING COMMISSION: for regulation of plumbing installation and  
PLUMBING INSTALLATION: sewage disposal.  
SEWAGE DISPOSAL:

OPINION NO. 317

December 21, 1967



Honorable Joe A. Johnson  
Assistant Prosecuting Attorney  
Jefferson County  
Hillsboro, Missouri 63050

Dear Mr. Johnson:

This is in reply to your request for an opinion on the question whether Jefferson County may adopt a building code which would include provisions for the regulation of plumbing installation and sewage disposal.

Jefferson County is a county of the second class. The authority of the county court to adopt a code of regulations for the construction or alteration of buildings is set forth in Section 64.170, RSMo Cum. Supp. 1965, as follows:

"For the purpose of promoting the public safety, health and general welfare, to protect life and property and to prevent the construction of fire hazardous buildings, the county court in all counties of the first and second class, as provided by law, is for this purpose empowered to adopt by order or ordinance regulations to control the construction, reconstruction, alteration or repair of any building or structure and any electrical wiring or electrical installation therein, and provide for the issuance of building permits and adopt regulations licensing persons, firms or corporations other than federal, state or local governments, public utilities and their contractors engaged in the business of electrical wiring or installations and provide for the inspection thereof and establish a schedule of permit, license and inspection fees and appoint a building commission to prepare the regulations, as herein provided."

Honorable Joe A. Johnson

In order to exercise the authority granted in Section 64.170 the county court shall appoint a building commission. Paragraph 1 of Section 64.180 provides:

"1. The county court of any county which shall exercise the authority granted under the provisions of sections 64.170 to 64.200 shall appoint a building commission consisting of five members, residents and taxpayers of the county, one of whom shall be a member of the county court, to be selected by the county court. The members of the commission shall serve without compensation for a term of two years. The term of the county court member shall not extend beyond the tenure of his office."

Article VI, Section 7, of the Constitution provides that the county court "\* \* \*shall manage all county business as prescribed by law, and keep an accurate record of its proceedings.\* \* \*"

Under the Constitution the county court is entitled to exercise the police power of the state within the limits of the county. State v. Loesch, et al., 169 S.W. 2d 675. It was the evident purpose of Section 64.170 to apply that power to the regulation of buildings to protect the public welfare, security and health of the people. The section uses terms which have been employed by the court to define police power. In Schroeder v. City of St. Louis, 228 S.W. 2d 677, l.c. 678, the court stated "\* \* \*The preservation and safeguarding of public health is within the police power of a city government.\* \* \*" In Wolpers v. Unemployment Compensation Commission, 186 S.W. 2d 440, l.c. 442, the court said "\* \* \*It is the public's welfare, not the individual's, that justifies an exercise of the police power by the State.\* \* \*" In Drainage District v. Small, 318 S.W. 2d 497, l.c. 502, the court said "\* \* \*drainage and levy districts operate under the police power of the state since their projects are essential to the health, safety and welfare of all; \* \* \*". In Kalbfell v. City of St. Louis, 211 S.W. 2d 911, l.c. 917, the court said "The power of enacting police regulations in the interest of the general welfare is a 'continuing one, and a business lawful today may in the future, because of the changed situation, the growth of population or other causes, become a menace to the public health and welfare, and be required to yield to the public good.'"

It must be presumed that Section 64.170 uses the words public health, safety and general welfare in a sense consistent with the cases just cited. It would hardly be justifiable to specify in a legislative act all the conditions which should be placed on the

Honorable Joe A. Johnson

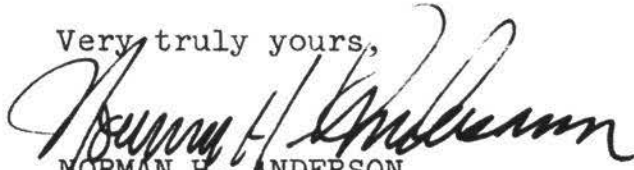
construction or alteration of buildings in the interest of public safety and general welfare. It was necessary and permissible that the duty of ascertaining the facts and prescribing conditions as circumstances required should be placed upon the county court under general directions as to the purpose and scope of their discretion. The cited cases recognize the validity of such delegation of administrative authority. It appears therefore that the legislature has granted to the county the right to regulate its development for the general benefit of its rapidly increasing population.

CONCLUSION

It is the opinion of this office that under Sections 64.170, RSMo Cum. Supp. 1965, and 64.180, RSMo 1959, counties of the first and second class may adopt building codes which include provisions for the regulation of plumbing installation and sewage disposal.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General



ELECTIONS:  
VOTING MACHINES:  
ELECTRONIC VOTING MACHINES:  
SECRETARY OF ELECTIONS:  
STICKERS:  
BLACK STICKERS:

Electronic voting systems may be used in second class counties containing part of city of more than 350,000 when ballot card placed in envelope, envelope number entered in poll books, second envelope number placed on ballot card and sticker placed on both numbers on envelope.

OPINION NO. 320

August 22, 1967

Mr. Lee Laramore  
Clay County Board of Election  
Commissioners  
Courthouse  
Liberty, Missouri



Dear Mr. Laramore:

This is in answer to your request for an opinion of this office concerning whether voting done under the provisions of House Bill No. 25 of the 74th General Assembly must comply with the provisions of Section 111.620, RSMo 1959, and what constitutes compliance. You have stated that automatic tabulating equipment will not work if the black sticker required by Section 111.620, supra, is placed directly on the ballot card used in the electronic voting system.

The method that you propose for voting under the provisions of House Bill No. 25 and also complying with Section 111.620, supra, is as follows:

1. Every ballot card will be placed in a ballot envelope;
2. Every ballot envelope will be numbered in numerical order in which received and this number will be entered in the poll books;
3. Every ballot envelope will also have marked thereon another number and this number will be placed on the ballot card;
4. A black sticker will be placed over both numbers on the ballot envelope so as to cover or conceal securely those numbers.

Article VIII, Section 3, Constitution of Missouri, reads as follows:

"All elections by the people shall be by ballot or by any mechanical method prescribed by law.

Mr. Lee Laramore

Every ballot voted shall be numbered in the order received and its number recorded by the election officers on the list of voters opposite the name of the voter. All election officers shall be sworn or affirmed not to disclose how any voter voted: Provided, that in cases of contested elections, grand jury investigations and in the trial of all civil or criminal cases in which the violation of any law relating to elections, including nominating elections, is under investigation or at issue, such officers may be required to testify and the ballots cast may be opened, examined, counted, compared with the list of voters and received as evidence."

Chapter 111, RSMo, provides for the conduct of elections. Section 111.510, RSMo 1959, provides for poll books to be kept by the judges and clerks of election. Section 111.630, RSMo 1959, provides for ballots to be placed in a ballot box and that the "clerks of election shall enter the names of voters and the number of the ballots, in the order in which they were received, in the poll books." Section 111.430, RSMo 1959, provides for ballots and the printing and numbering of such ballots.

Section 111.620, RSMo 1959, provides a procedure for maintaining secrecy of the ballot and yet to allow an election to be contested. This section reads as follows:

"Every ballot shall be numbered in numerical order in which received, and it shall be the duty of the election judges, in the presence of the voter, before any ballot is placed in the ballot box, to cover or conceal securely the identifying number or numbers placed on the ballot by placing over the number or numbers, and pasting down, a black sticker, which sticker is to be two inches square with gummed edges extending three-eighths of an inch towards the center of the square, so as to conceal but not destroy, the number or numbers placed thereon. Such stickers shall be supplied to the election judges by the county clerk or board of election commissioners of each county or city, and no sticker shall be removed except in case of contested election, grand jury investigations, or in the trial of all civil or criminal cases in which the violations of any law relating to elections, including primary elections, is under investigation or at issue and then only on the order of a proper court or judge thereof in vacation. No judge of election shall deposit any ballot upon which

Mr. Lee Laramore

the names or initials of the judges as herein provided for, do not appear."

House Bill No. 25 provides for an electronic voting system so as to allow vote counting by special data processing machines. Section 2 of House Bill No. 25 provides that this voting procedure may be used in certain second class counties. We note that House Bill No. 25 applies to Clay County.

The electronic voting system and what it is comprised of can best be described by Section 1, the definition section, of House Bill No. 25 which reads as follows:

"Section 1. As used in this act, unless otherwise specified:

(1) 'Automatic tabulating equipment', includes apparatus necessary to automatically examine and count votes as designated on ballots and data processing machines which can be used for counting ballots and tabulating results;

(2) 'Ballot card', a ballot which is voted by the process of punching;

(3) 'Ballot labels', the cards, papers, booklet, pages or other material containing the names of offices and candidates and statements of measures to be voted on;

(4) 'Ballot', may include ballot cards, ballot labels and paper ballots;

(5) 'Counting location', a location selected by the board of election commissioners for the automatic processing or counting, or both, of ballots;

(6) 'Electronic voting system', a system of casting votes by use of marking devices and tabulating ballots employing automatic tabulating equipment or data processing equipment; and

(7) 'Marking device', either an apparatus in which ballots or ballot cards are inserted and used in connection with a punch apparatus for the piercing of ballots by the voter or any approved device for marking a paper ballot with ink or other substance which will enable the ballot to be tabulated by means of automatic tabulating equipment."

An electronic voting system may be used as follows, Subsection 4, Section 2, House Bill No. 25:

Mr. Lee Laramore

"The board of election commissioners of any second class county containing all or part of a city or more than three hundred fifty thousand inhabitants may with the consent and approval of the county court adopt, experiment with, or abandon any electronic voting system herein authorized and approved for use in the state, and may use such system in all or part of the precincts within its boundaries, or in combination with paper ballots. It may enlarge, consolidate, or alter the boundaries of the precincts where an electronic voting system is to be used."

The Secretary of State has certain authority under House Bill No. 25 as follows, Subsection 1, Section 5:

"1. The secretary of state may promulgate rules for the administration of this section, and shall approve the marking devices and automatic tabulating equipment used in electronic voting systems."

However, no electronic voting system shall be used unless it fulfills certain requirements, two of which are as follows, Subsection 2, Section 5, House Bill No. 25:

"(1) It shall permit voting in absolute secrecy.

\* \* \* \* \*

(4) It shall comply with all other requirements of the election laws so far as they are applicable."

The first question to be answered is whether the provisions of Section 111.620, supra, apply at all.

In *Straughan v. Meyers*, 268 Mo. 580, 187 S.W. 1159, the Supreme Court of Missouri said that the purpose of Article VIII, Section 3, Constitution of Missouri, "is to provide a means of contesting elections and so preserve evidence that it may be used for this purpose." Section 111.620, supra, was enacted to accomplish that purpose, while at the same time maintaining secrecy. The legislature declared its intent that House Bill No. 25 comply with Article VIII, Section 3, by making it a requirement in Subsection 2 of Section 5 that no electronic voting system be used unless there is absolute secrecy and that all other requirements of the election laws be complied with so far as applicable.

Therefore, it is our opinion that Section 111.620, supra, applies to an electronic voting system as provided in House Bill No. 25. However, the next question is whether there must be literal compliance to the extent of applying a black sticker on the ballot card used in an electronic voting system. You have stated that if such a black sticker is applied directly to the ballot card that the automatic tabulating equipment will not work.

Mr. Lee Laramore

The St. Louis Court of Appeals in *State ex rel Beach v. Sutton*, 3 Mo.App. 388, said that, 1.c. 407:

"\* \* \* the mere omission to number the ballots does not have the effect of invalidating the ballot and depriving the voter of his vote.  
\* \* \* One of the primary objects is to preserve the purity of the ballot. Without this, elective government is at an end. Another important object is to secure the secrecy of the ballot. The voter has a right to vote as he pleases, and is not to be subjected to any control or interference on the part of others. These two things, to a certain extent, clash. If there were to be contested elections, ballots must be examined, and, on investigation, it may become known how voters voted."

In *Riefle v. Kamp*, 241 Mo.App. 1151, 247 S.W.2d 333, the Court Appeals held, 1.c. S.W.2d 336:

"The omission of the election officials or the unaccounted for absence of a sticker should not deprive the voter of his right to have his ballot counted. *Hehl v. Guion*, 155 Mo. 76, 55 S.W. 1024."

Finally, in *Kasten v. Guth*, Mo., 395 S.W.2d 433, 435 [2, 3], it was held that the fact certain votes did not contain the proper initials nor have the black sticker did not make the votes void.

Thus, it is not a fatal irregularity even for "paper ballots" not to be in literal compliance with Section 111.620, *supra*.

Subsection 3 of Section 2 of House Bill No. 25 provides that "[S]o far as applicable, the procedure provided for voting paper ballots shall apply."

It is our opinion that voting by an electronic voting system must comply with the purposes of Section 111.620, *supra*, as well as and as required by Subsection 2, Section 4, House Bill No. 25. This means that there must be secrecy of the ballot and also purity of the ballot or a means to examine the ballot if there is a contested election. This does not mean, however, that there must be literal compliance with Section 111.620, *supra*, by placing a black sticker on the ballot card.

It is our opinion that the method proposed in this opinion request fulfills the requirements of House Bill No. 25 and Section 111.620, *supra*.

It is our further opinion that under the authority of Subsection 1, Section 4, House Bill No. 25, the Secretary of State shall approve



Mr. Lee Laramore

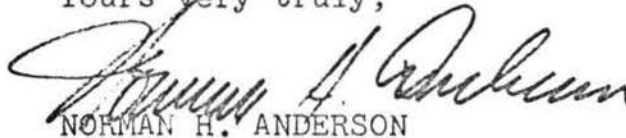
the marking devices and automatic tabulating equipment used in electronic voting systems.

CONCLUSION

It is the opinion of this office that an electronic voting system as provided for in House Bill No. 25 of the 74th General Assembly must comply with Section 111.620, RSMo 1959, in that there must be secrecy of the ballot and also a means to examine the ballot if there is a contested election. However, there does not have to be literal compliance with Section 111.620, RSMo 1959, by placing a black sticker on the ballot card. It is our opinion that in a voting system in which every ballot card is placed in a ballot envelope; every ballot envelope is numbered in numerical order in which received and this number is entered in the poll books; every ballot envelope has also marked thereon another number and this number is placed on the ballot card; a black sticker is placed over both numbers on the ballot envelope so as to cover or conceal securely those numbers, the requirements of House Bill No. 25 and Section 111.620 are fulfilled. Under the authority of Subsection 1, Section 4, House Bill 25, the Secretary of State shall approve the marking devices and automatic tabulating equipment used in such electronic voting systems.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,



NORMAN H. ANDERSON  
Attorney General

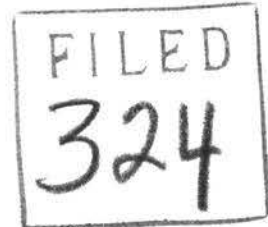


LICENSE FEES: The annual license tax prescribed by Section 318.020,  
POOL TABLES: RSMo 1959, for tables described in Section 318.010,  
RSMo 1959, is applicable to pool tables which are  
not regulation size and are coin operated.

OPINION NO. 324

July 25, 1967

Honorable Harry L. Porter  
Prosecuting Attorney  
Linn County  
Marceline, Missouri 64658



Dear Mr. Porter:

This is to acknowledge receipt of your request for an official opinion from this office which states in part as follows:

"We have several business men in this county engaged in the operation of pool rooms which object to the payment of license fees required by Chapter 318 V.A.M.S. on the grounds that their tables are not full size.

Most of the tables involved are approximately 4' x 8' in dimensions whereas I understand the regulation size is 4'6" x 9'.

In addition to the slightly under-size pool tables, there are some quite small tables which are coin operated.

I have agreed to submit the matter to your office and if you have an opinion concerning this matter, we will appreciate receiving a copy of it."

Statutory provisions in regard to the licensing of pool tables are found in Chapter 318, RSMo 1959. Section 318.010, RSMo 1959, provides as follows:

"The county court shall have power to license the keepers of billiard tables and all similar tables upon which balls or cues are used. At each term, the clerk of said court shall prepare and deliver to the collector of their

Honorable Harry L. Porter

county, as many blank licenses for the keepers of such tables herein mentioned as the respective courts shall direct which shall be signed by the clerk and attested by the seal of the court."

Section 318.020, RSMo 1959, provides as follows:

"The collector shall deliver to any person who shall have been licensed, a license to keep any such table mentioned in section 318.010 in their respective counties, for a term of twelve months, upon the payment by the applicant of the sum of twenty dollars for each billiard table, and ten dollars for each other table described in said section, and the collector shall countersign such license before delivering the same to the applicant; provided, that if the applicant be the keeper of more than one of such tables, the number may be named in one license, and in such case the clerk shall not be entitled to more than one fee as provided in section 318.050."

In an opinion rendered by this office holding that a pool table was subject to a license tax, it was stated that common knowledge attests to the fact that pool tables are tables upon which balls and cues are used and were within the statutory language of billiard tables and "all other tables". Op. Att. Gen. No. 6, Belew, 9-24-52. Although Section 318.010, supra, was subsequently amended so that the language is now stated as billiard tables and "all similar tables", it is submitted that the same conclusion is applicable to the matter in dispute.

The primary rule to be applied in construction of statutes is to ascertain and give effect to the legislative intent.--St. Louis Southwestern Ry. Co. v. State Tax Commission of Mo., 319 S.W.2d 559. Section 318.020, supra, clearly imposes an annual tax of twenty dollars on each billiard table, and an annual state license tax of ten dollars on "each other table" described in Section 318.010, supra, which specifically refers to billiard tables and "all similar tables" upon which balls and cues are used. Thus it may be stated that the legislation involved was directed at keepers of billiard and other tables of similar description and was intended as a revenue measure and to regulate the business of such keepers. See State v. Shotts, 128 S.W. 245, 143 Mo.App. 346. As a result of such legislative purpose, we do not believe that the size of the

Honorable Harry L. Porter

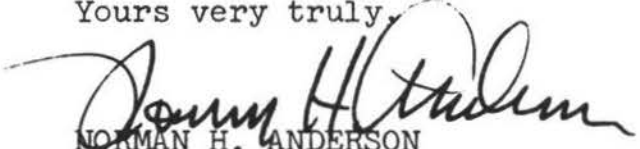
pool tables or the method of initiating operation detracts from the statutory language of "similar tables" in view of the fact that such tables are ones upon which balls and cues are used, are games of skill and amusement, and are operated for profit. A Fortiori, in determining what amusements are within the requirements of licensing statutes, the descriptive words used must be taken in their ordinarily accepted meaning, and in their familiar and popular sense, and without any forced, subtle, or technical construction to limit their meaning. 86 C.J.S., Theaters and Shows, Section 18.

CONCLUSION

It is the opinion of this office that the annual license tax prescribed by Section 318.020, RSMo 1959, for tables described in Section 318.010, RSMo 1959, is applicable to pool tables which are not regulation size and are coin operated.

The foregoing opinion which I hereby approve was prepared by my assistant, B. J. Jones.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

July 20, 1967

OPINION NO. 327  
Answered by Letter-Nowotny

Honorable Haskell Holman  
Auditor for State of Missouri  
Capitol Building  
Jefferson City, Missouri



Dear Mr. Holman:

This is in answer to your request for an opinion of this office, which request reads as follows:

"When this office is requested, either under the provisions of Section 29.230 Cumulative Supplement 1965 or Section 50.055, RSMo 1959, to audit a second class county is there a maximum amount the county is liable for or is the county obligated for the entire cost incurred by this office in making said audit?"

Enclosed is a copy of Attorney General Opinion No. 293, dated June 15, 1967, issued to the Honorable Haskell Holman, in which we held that the State Auditor must make an audit of a second class county when requested to do so under the provisions of either Section 50.055, RSMo 1959, or Section 29.230, RSMo Supp. 1965.

The appropriate part of Section 29.230, supra, pertaining to the cost of an audit made under the provisions of that section reads as follows:

"2. \* \* \* The political subdivision shall pay the actual cost of audit.\* \* \*"

The appropriate part of Section 50.055, supra, pertaining to the cost of an audit made under the provisions of that section reads as follows:

Honorable Haskell Holman

"\* \* \* The County Court shall provide for the expense of such audit, which in no event shall exceed the sum of five thousand dollars, if made by a certified public accountant employed by the county court."

It is our opinion that if an audit is made by the State Auditor under the provisions of either Section 29.230 or Section 50.055, supra, the plain intent of both statutes is that the county requesting the audit is obligated for the entire cost incurred by the State Auditor in making the audit. It is only when the county court, under the authority of Section 50.055, supra, employs a certified public accountant that there is a maximum cost to an audit.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

WHL:man

Enclosure - Opinion No. 293, Holman,  
June 15, 1967

CONTEMPT:  
WORKMEN'S COMPENSATION:  
WITNESSES:  
VENUE:

Venue of offense of witness not appearing  
in Workmen's Compensation hearing is in  
county where witness was to appear.

OPINION NO. 328

August 17, 1967

Honorable James N. Foley  
Prosecuting Attorney  
Macon County  
Macon, Missouri 63552



Dear Mr. Foley:

This is in response to your letter of July 10, 1967, in which you request an opinion from this office as to whether the venue is in Boone County or Macon County of an offense committed by a witness for failure to respond to a subpoena issued by a referee for the Division of Workmen's Compensation for the witness to appear and testify at a hearing to be held in the Courthouse in Macon County when the witness was subpoenaed in Boone County, Missouri.

Section 287.570, RSMo, provides:

"If any person subpoenaed to appear at any hearing or proceeding, fails to obey the command of such subpoena without reasonable cause, or if any person at attendance at any hearing or proceeding shall without reasonable cause, refuse to be sworn, or to be examined, or to answer a question, or to produce a book or paper or to subscribe or swear to his deposition, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment, and may be prosecuted therefor in any court of competent jurisdiction, and in case of a continuing violation, each day's continuance thereof shall be, and deemed to be, a separate and distinct offense."



Honorable James N. Foley

Under this statute a person who is duly subpoenaed as a witness to testify before the Division of Workmen's Compensation at a hearing or any proceeding and fails to respond is guilty of a misdemeanor and subject to a fine or jail sentence or both. The failure to appear constitutes a crime under this statute.

Article I, Section 18(a), Constitution of Missouri, provides that in criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury of the county.

Section 541.030, RSMo, provides that offenses committed against the laws of this state shall be prosecuted in the county in which the offense is committed except as may be otherwise provided by law.

Assuming for the purposes of this opinion that under the facts submitted, Section 287.040, *supra*, was violated and an offense was committed, the question then arises where the offense was committed, whether in Macon County where the witness was summoned to appear and failed to appear or in Boone County where the subpoena was served on the witness.

In *State v. Civella*, 368 S.W.2d 444, the defendant was charged for failure to file an income tax return. Failure to file such return constitutes a misdemeanor. Under the statute the defendant was authorized to file his income tax return with the Director of Revenue, Jefferson City, Missouri, or in several district offices including Jackson County. In holding that the offense was committed in Jackson County and that venue was in Jackson County and after quoting Section 541.030, *supra*, the court stated:

" \* \* \* It has long been the uniformly accepted rule that 'Where the offense consists of a failure or omission to act, the crime is usually regarded as committed in the district [or county] where the act should have been performed. Thus, where one is required by a penal law to file a document in a certain district [or county], the failure to do so is a crime committed in the district [or county] in which the document was required to be filed.' 22 C.J.S. Criminal Law §182 (1), pp. 443-445. \* \* \* "

In *State v. Bruster*, 93 A. 189 (Supreme Court of New Jersey) the defendant failed to appear as a witness after being summoned to appear before a legislative committee. The statute provided that any witness summoned to appear before any such committee who

Honorable James N. Foley

shall willfully neglect or refuse to appear in obedience to the summons or refuse to be sworn he shall be guilty of a misdemeanor. This defendant was served with a subpoena in Bergen County, New Jersey, to appear before the committee in Mercer County, New Jersey. The indictment was returned by a grand jury in Mercer County and in discussing the question of venue the court stated l.c. 190:

"[1] The first is that the indictment does not show where the summons was served, and that if not served in the county of Mercer, then no offense was committed in that county, but in the county where the service was made, and over which the criminal courts of Mercer county would have no jurisdiction, and therefore the place of service was material and should have been alleged. We are of opinion that this argument is not applicable to the present proceedings, for the statute which creates the crime for which the defendant is indicted is a willful refusal to appear in obedience to the summons at the place named therein, or to be sworn or affirmed.

"The crime does not rest upon the mental conclusion of the defendant that he will not obey, but upon the fact that he does not appear at the place designated or refuses to be sworn and is not complete until he fails to present himself as required in the summons that he may be sworn, and also his refusing to be sworn. His absence amounts to a refusal to be sworn, which is an element of the offense charged in this indictment. \* \* \* "

In the present case the witness was duly summoned to appear in Macon County, Missouri. He was subpoenaed in Boone County, Missouri. He was summoned to appear as a witness at a certain time and place in Macon County and to testify as a witness before the Division of Workmen's Compensation. This, under the facts submitted, he failed to do. Under Section 287.570, supra, any person subpoenaed to appear at any hearing before the Division of Workmen's Compensation who fails to obey the subpoena without reasonable cause or who refuses

Honorable James N. Foley


to be sworn or examined or to produce books and papers is guilty of a misdemeanor. The offense is not complete until the witness failed to appear at the designated time and place which would be Macon County. The venue would be with the court having jurisdiction over misdemeanors in Macon County where the witness failed to appear.

CONCLUSION

It is the opinion of this department that the offense of refusing to appear and be sworn as a witness under Section 287.570, RSMo, is committed in the county where the witness was summoned to appear and the testimony was to be given and the court having jurisdiction over misdemeanors in that county would have venue for the offense.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

TAXATION:  
SALES/USE TAXES:  
REFUND:

The Director of Revenue may grant a refund of overpaid sales and use taxes as authorized by Section 144.190, RSMo 1959, only when a proper claim for said refund is filed within one year from the date of overpayment.

OPINION NO. 330

October 26, 1967

Mr. Thomas A. David  
Director of Revenue  
Department of Revenue  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. David:

This is in answer to your request for an opinion of this office concerning whether a refund can be made to a pipeline company for use taxes which have been incorrectly paid since the year 1959.

The facts giving rise to this opinion are as follows. For several years, the Department of Revenue has collected taxes for the use of gas by pipeline companies used and consumed to drive the compression engines of such companies which engines are used to transport gas in this state. Recently, after consulting with this office, the Department decided, under the authority of *Kansas City Power and Light Co. v. Kansas City Public Service Co.*, Mo.Supp. 111 S.W.2d 516, that this use was not by a domestic, commercial or industrial consumer and was not taxable under Chapter 144.

The authority of the Director of Revenue to refund taxes wrongfully collected under Chapter 144, RSMo 1959, is governed by Section 144.190 which provides in part as follows:

"1. If a tax has been incorrectly computed by reason of a clerical error or mistake on the part of the director of revenue, such fact shall be set forth in the records of the director of revenue, and the amount of the overpayment shall be credited on any taxes then due from the person under sections 144.010 to 144.510 and the balance shall be refunded to the person, his administrators or executors, as provides for in section 144.200.

Mr. Thomas A. David

"2. If any tax, penalty or interest has been paid more than once, or has been erroneously or illegally collected, or has been erroneously or illegally computed, such sum shall be credited on any taxes then due from the person under sections 144.010 to 144.510, and the balance shall be refunded to the person, but no such credit or refund shall be allowed unless duplicate copies of a claim for refund are filed within one year from date of overpayment."

Since the director has determined that no tax is due on the use of gas as described above, it follows that previous payments of such taxes were erroneous and subject to refund in accordance with paragraph 2 above. But the method of recovery provided therein is exclusive and no taxes may be refunded unless a proper claim for refund has been filed within one year after the date of overpayment. *International Business Machines, Inc., v. State Tax Commission*, Mo.Sup., 362 S.W.2d 635; *Kleban v. Morris*, Mo.Sup. 247 S.W.2d 832.

The above mentioned cases also make it clear that this statute alone governs refunds for alleged overpayments of taxes imposed by Chapter 144, and Section 136.035, RSMo, allowing the refund of any overpayment or erroneous tax which the state is authorized to collect provided a claim for refund has been filed within two years after the date of overpayment, is not applicable.

It has been urged that the one year time limitation provided in paragraph 2 of Section 144.190 is not applicable when a tax was incorrectly computed by reason of a clerical error or mistake on the part of the director of revenue as provided in paragraph 1 thereof. It is not necessary to discuss this question since the overpayment in this case did not result from a clerical error or mistake by the director but from what has been discovered to be an erroneous interpretation of the law. In such circumstances it is the duty of the taxpayer to correct this mistake by appropriate proceedings. The fact that the director later voluntarily judges the tax to be erroneous does not relieve the taxpayer of his duty.

The provisions of Section 144.700, RSMo Supp. 1965, governing protest payments provide an alternative method of procedure to determine the liability of the taxpayer for taxes and is not relevant to refund claims under Section 144.190.

#### CONCLUSION

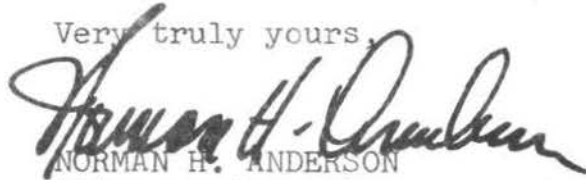
The Director of Revenue may grant a refund of overpaid sales and use taxes as authorized by Section 144.190, RSMo 1959, only when

Mr. Thomas A. David

a proper claim for said refund is filed within one year from the date of overpayment.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John H. Denman.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Norman H. Anderson", written in a cursive style.

NORMAN H. ANDERSON  
Attorney General



COSMETOLOGY:

Section 329.070, RSMo 1959, requires a person to be at least seventeen years of age before that person can be an apprentice or student. The State Board of Cosmetology cannot waive this requirement.

OPINION NO. 332

September 1, 1967

Mrs. Jean Casey  
Executive Secretary  
Missouri State Board of  
Cosmetology  
1502 West Dunklin  
Jefferson City, Missouri



Dear Mrs. Casey:

This is in answer to your request for an opinion of this office, which request reads as follows:

"I would like to request an official Attorney General opinion on Section 329.070. Registration of apprentices or students, fee, qualification.

The St. Louis Board of Education has asked the State Board of Cosmetology for a waiver of the age of 17 for students enrolling in the O'Fallon Technical School of Cosmetology.

My question is, 'Does the Board have the right to waiver this law.'"

Chapter 329, RSMo, provides for the licensing and regulation of persons practicing cosmetology. Section 329.030, RSMo 1959, makes it unlawful to engage in the practice of cosmetology without a certificate of registration as provided for in Section 329.040, RSMo 1959.

The qualifications for examination or registration are set out in Section 329.050, RSMo 1959. This section reads in part as follows:

"(2) They shall have served and completed as an apprentice under the supervision of a registered operator the time and studies required by the board which shall be not less than one year for hairdressers and cosmetologists and not less than three months for manicurists; or shall have

had the required time in a registered school of at least one thousand hours' training over a period of six consecutive months for the classifications of hairdressers and cosmetologists and at least one hundred fifty hours for manicurists, except that operators having taken manicuring together with hairdressing or cosmetology shall not be required to serve the extra hours otherwise required to include manicuring; and"

An "apprentice" or "student" is defined in Section 329.010, RSMo 1959, as follows:

"(1) \* \* \* is a person who is engaged in training within a hairdressing or cosmetologist's or manicurist's establishment or school, and while so training assists in any of the practices of the classified occupations within this chapter under the immediate direction and supervision of a registered operator or instructor;"

Section 329.070, RSMo 1959, provides for the registration of apprentices or students and reads as follows:

"Apprentices or students shall be registered with the state board of cosmetology and shall pay a registration fee of one dollar, and, while learning or acquiring any of the practices of the classified occupations shall be at least seventeen years of age, of good moral character and have an education equivalent to the eighth grade."

The primary rule in construing statutes is to ascertain and give effect to the legislative intent and words must be given their plain and ordinary meaning with a view to promoting the apparent objective of the legislature by their use. *St. Louis Southwestern Ry. Co. v. State Tax Commission of Missouri*, Mo., 319 S.W.2d 559.

It is our opinion that legislative intent is plain that a person must be at least seventeen years of age before that person can be an apprentice or student.

The State Board of Cosmetology created and established by Section 329.180, RSMo 1959, has certain powers enumerated by Section 329.210, RSMo 1959. Neither this section nor any other section of Chapter 329, *supra*, authorizes the State Board of Cosmetology to waive the requirements of Section 329.070, *supra*. In *State ex rel. Springfield Warehouse and Transfer Co. v. Public Service Commission*, 240 Mo.App., 1147, 225 S.W.2d 792, it was held that the Public Service Commission of Missouri has no power except that granted by the legislature, and the Commission cannot adopt a rule, or follow a

Mrs. Jean Casey

practice, which results in nullifying the expressed will of the legislature, and it cannot, under the theory of construction of a statute, proceed in a manner contrary to the plain terms of a statute.


Since the requirement of seventeen years of age is plainly established by statute the State Board of Cosmetology cannot waive the requirement.

CONCLUSION

It is the opinion of this office that Section 329.070, RSMo 1952, requires a person to be at least seventeen years of age before that person can be an apprentice or student. It is our further opinion that the State Board of Cosmetology cannot waive this requirement.

The foregoing opinion, which I hereby approve, was prepared by mr assistant, Walter W. Nowotny, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

CONSTITUTIONAL AMENDMENT: Ballot Title for House Joint  
Resolution No. 6

July 31, 1967



Honorable James E. Kirkpatrick  
Secretary of State  
Capitol Building  
Jefferson City, Missouri

Re: House Joint Resolution No. 6

Dear Mr. Kirkpatrick:

Pursuant to your request of July 14, 1967, and pursuant to the directive found in Section 125.030, RSMo., I submit the following ballot title in relation to the above subject.

Reduces percentage of voters required to approve municipal general obligation bonds from two-thirds to sixty-percent. Adds municipalities within counties above 400,000 population so as to authorize all municipalities to issue industrial development general obligation bonds.

Reduces percentage of voters required to approve municipal revenue bonds from four-sevenths to majority of voters. Adds sewerage systems, stadiums, exhibition halls and bridges to purposes for which municipalities may issue revenue bonds.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

OPINION NO. 334  
Answered by Letter - Wood

CONSTITUTIONAL AMENDMENT: Ballot Title for Senate  
Joint Resolution No. 10

July 31, 1967



Honorable James C. Kirkpatrick  
Secretary of State of Missouri  
Capitol Building  
Jefferson City, Missouri

Re: Senate Joint Resolution No. 10

Dear Mr. Kirkpatrick:

Pursuant to your request of July 14, 1967, and pursuant to the directive found in Section 125.030, RSMo., I submit the following ballot title in relation to the above subject.

Adds secretary of state, state auditor, state treasurer, and attorney general, in that order, to follow lieutenant governor, president pro tempore of senate, and speaker of house in line of succession to governor in case of vacancy or disability. Creates board composed of officers in line of succession plus majority floor leader of senate and house which may, by majority vote, declare governor unable to perform his official duties. If governor disagrees, supreme court decides issue.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

OPINION NO. 336  
Answered by Letter--PETERSON

September 27, 1967



Honorable Donald L. Manford  
State Representative--18th District  
Missouri House of Representatives  
9409 Oakland  
Kansas City, Missouri 64138

Dear Representative Manford:

This is in answer to your recent question concerning the application of Senate Bill No. 262, 74th General Assembly.

You inquired as to whether or not the salary increases for magistrate court clerks contained in Senate Bill No. 262, supra, applied to such clerks in Jackson County, Missouri.

Senate Bill No. 262, supra, repealed Sections 483.490 and 483.495, RSMo Cum. Supp. 1965. An examination of the repealed sections and Senate Bill No. 262, supra, indicates that the previous law applied to Jackson County by authority of Section 482.250, RSMo Cum. Supp. 1961, and the bill makes no changes in that respect.

The provisions of Senate Bill No. 262, supra, apply to magistrate court clerks in Jackson County.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

WAP/jlf



PUBLIC RECORDS: The recorder of deeds has the authority  
RECORDER OF DEEDS: and duty to determine whether instruments  
MICROFILMING OF RECORDS: entitled to be recorded in his office are  
to be recorded by making photographic  
copies of such instruments which shall be  
bound, paged and indexed in record books  
pursuant to Section 59.410 RSMo 1959, or whether such instruments  
are to be recorded by means of microfilm or other mechanical process  
pursuant to Section 109.120, RSMo Cum. Supp. 1965.

OPINION NO. 337

August 22, 1967

Honorable Harry C. Raiffie  
State Representative, 82nd District  
City of St. Louis  
4151 Delmar  
St. Louis, Missouri 63112



Dear Mr. Raiffie:

This office is in receipt of your recent request for an official opinion. You thus state your request:

"I would like an opinion regarding Section 59.410, RSMo, as it applies to the records kept in the Recorder of Deeds Office and whether or not they must be bound, paged and indexed whether they are photostatic copies or not. I would also like to know if any of the language in this Section has been repealed.

"Further, I would like to know what affect if any Section 109.120, Part 3, 1963 Cum. Supp., RSMo, has on the above statute."

Section 59.410 RSMo, is as follows:

"Wherever the statutes require deeds, mortgages, conveyances, deeds of trust, bonds, covenants, documents, marriage contracts, certificates of marriage, commissions, official bonds, statements, records, plats, surveys, schedules, papers, patents, or other instruments of writing

Honorable Harry C. Raiffie

to be recorded, the making of photographic copies of such deeds or other instruments of writing shall be deemed recording within the meaning of this chapter. Such photographic copies shall be bound, paged and indexed wherever it is so provided for deeds or other instruments recorded by hand, and such photographic copies when bound together shall be deemed record books within the meaning of this chapter."

Paragraph 3 of Section 109.120 RSMo Cum. Supp. 1965, is as follows:

"When any recorder of deeds in this state is required or authorized by law to record, copy, file, recopy, replace or index any document, plat, map or written instrument, he may do so by photostatic, photographic, microphotographic, microfilm, or similar mechanical process which produces a clear, accurate and permanent copy of the original. The reproductions so made may be used as permanent records of the original. When microfilm or a similar reproduction is used as a permanent record by recorder of deeds, duplicate reproductions of all recorded documents, indexes and files required by law to be kept by him shall be made and one copy of each document shall be stored in a fireproof vault and the other copy shall be readily available in his office together with suitable equipment for viewing the filmed record by projection to a size not smaller than the original and for reproducing copies of the recorded or filmed documents for any person entitled thereto. In all cases where instruments are recorded under the provisions of this section by microfilm, any release, assignment or other instrument affecting a previously recorded instrument by microfilm may not be made by marginal entry but shall be filed and recorded as a separate instrument and shall be in a separate book, cross-indexed to the document which it affects."

Honorable Harry C. Raiffie

Prior to 1917 the manner of recording instruments was "by writing them word for word, in a fair hand." In Laws 1917, p. 441, the legislature provided that the making of photographic copies of instruments shall be deemed recording and required such photographic copies to be bound, paged and indexed as set forth above in Section 59.410.

Authorization to record instruments by microfilm or similar mechanical process was first given by the legislature in 1945, Laws 1945, p. 1427. In 1963 this authorization was expanded by an amendment expressly providing that any recorder of deeds may record written instruments by microfilm or similar mechanical process as set forth in Section 109.120 quoted above.

It is to be observed that the legislative grant of power to the recorder to make photographic copies under Section 59.410, was not repealed or diminished when the legislature enacted Section 109.120. Thus, the enactment of Section 109.120 effected no change in Section 59.410. It appears therefore, that by the enactment of Section 109.120, the legislature intended to make available an alternative method of recording instruments, but it placed upon the recorder the sole responsibility for selecting which of these methods are to be followed in performing the duties of his office.

Apparently the question whether the recorder may be required to adopt a particular method of recording has never been raised in Missouri and we have found no cases where it has been considered by Missouri courts. However, the question has been considered by the courts in other jurisdictions.

In *Town of Bennington v. Booth*, 140 A. 157, the Supreme Court of Vermont held that the selectmen of the town of Bennington had no express power to require the town clerk, who kept his records in a lawful manner, to conform to their ideas as to what method he should use, and that the selectmen had no right to notify the clerk to refrain from the use of photographic recording. To the same effect is *People v. Haas*, 142 N.E. 549, 551; here the Supreme Court of Illinois stated:

"The recorder of deeds of Cook County is a county officer . . . . Every such officer, not only has the authority, but is required by law, to exercise an intelligent discretion in the performance of his official duties. The law requires him to record certain instruments

Honorable Harry C. Raiffie


in a well-bound book, but it does not require him to record them by any particular method. As long as the method adopted by him is accurate and durable, he has performed his duty. While the courts can compel him to record instruments entitled to be recorded in well-bound books, they have no right to compel him to record them in a particular way.  
\* \* \* "

CONCLUSION

It is the opinion of this office that the recorder of deeds has the authority and duty to determine whether instruments entitled to be recorded in his office are to be recorded by making photographic copies of such instruments which shall be bound, paged and indexed in record books pursuant to Section 59.410, RSMo 1959, or whether such instruments are to be recorded by means of microfilm or other mechanical process pursuant to Section 109.120, RSMo Cum. Supp. 1965.

The foregoing opinion, which I hereby approve, was prepared by my assistant L. J. Gardner.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

August 21, 1967

Opinion No. 338  
Answer by Letter-Denman

Honorable H. Dean Whipple  
Prosecuting Attorney  
Laclede County  
Lebanon, Missouri 65536



Dear Mr. Whipple:

This is in answer to your recent request for an opinion of this office as to whether a building, owned by the County Library Board, and rented to a commercial business is subject to taxation.

Enclosed herewith is a copy of our opinion number 86, issued October 19, 1961, to the Honorable Stephen E. Strom, Prosecuting Attorney of Cape Girardeau County in which we found that while real property and improvements constructed thereon which are owned by a political subdivision of the state, a municipality, and leased to a private corporation may not be assessed against the political subdivision for property taxes, the private lessee's interest therein is subject to taxation. Also enclosed is opinion number 68, issued August 14, 1961, to Clarence H. Overbay, Jr., which also relates to your question.

This opinion was based upon the decisions of the Missouri Supreme Court in *State ex rel Benson v. Personnel Housing, Inc.*, Mo.Sup. 300 S.W.2d 506, and the earlier case, *State ex rel Zieginhein v. Missouri Free School*, Mo.Sup., 62 S.W. 998. Although the question was avoided in the recent case of *St. Louis County v. State Tax Commission*, Mo.Banc 406 S.W.2d 644, the former cases have not been overruled. The question is again before Division 2 of the Court in *Iron County, Missouri v. State Tax Commission*, No. 52596 which will be argued at the September term of this year. However, the question of whether the leasehold interest of the private lessee has any value is also involved and it is possible that the Court again will avoid a direct ruling on the question whether such an interest is taxable.

However, we feel that the conclusion reached in our opinion number 86 is correct, and the interest of a private commercial busi-

Honorable H. Dean Whipple

ness in a building, owned by the County Library, but leased to the business, is subject to taxation as real property under the provisions of Section 137.100, RSMo 1959, and Section 6 of Article X of the Constitution of Missouri.

Case should be taken in valuating the lessee's interest in leased property so that only such interest is assessed. One method of making such a valuation is set out in St. Louis County v. State Tax Commission, supra.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

JHD:maw

Enclosures: Opinion No. 86  
10-19-61, Strom

Opinion No. 68  
8-14-61, Overbay



LEGISLATORS:  
SENATORS:  
REPRESENTATIVES:  
GENERAL ASSEMBLY:  
LEGISLATURE:  
COMPENSATION:

Increase in compensation for Senators and representatives under House Bill No. 100 of the 74th General Assembly effective first day of regular session of 75th General Assembly. Increase applies to holdover Senators as of such date.

OPINION NO. 339

August 1, 1967

Honorable John C. Vaughn  
Comptroller and Budget Director  
State of Missouri  
Jefferson City, Missouri



Dear Mr. Vaughn:

This is in answer to your opinion request of recent date reading as follows:

"By constitutional amendment approved by the voters on November 8, 1960, the General assembly of Missouri is authorized to fix the salaries of its members. Pursuant to the amendment, the 74th General Assembly met in regular session on July 26, 1967, and passed House Bill No. 100, establishing legislative salaries at \$8,400 per year. The additional appropriation for these salary increases was Section 28 of Conference Committee Substitute for House Bill No. 877, in the amount of \$525,000.00.

"In view of Section 13, Article VII, of the Missouri Constitution, are members of the General Assembly whose terms expire from January 1968 to January 1970 entitled to receive the salary provided by House Bill No. 100 now? Is the salary provision of House Bill No. 100 equally applicable to all Senators and Representatives, including holdover Senators, and what will be the effective date for payment of the \$8,400 per year compensation?

Section 16 of Article III, of the Constitution of Missouri, provides in part as follows:

"Senators and representatives, until otherwise provided by law, shall receive from the state treasury as salary the sum of one hundred and twenty-five dollars per month. No law fixing the compensation of members of the general assembly shall become effective until the first day of the regular session of the general assembly next following the session at which the law was enacted."

Pursuant to such constitutional provision, House Bill No. 100 was enacted by the 74th General Assembly repealing Section 21.140, RSMo Supp., 1965, and enacting in lieu thereof, Section 21.140, providing that the annual salary of Senators and Representatives shall be \$8,400.

Under the unequivocal language of the second sentence of Section 16 of Article III of the Constitution, it is clear that a law passed by the 74th General Assembly fixing the compensation of Senators and Representatives shall not become effective before the first day of the regular session of the 75th General Assembly.

Since no date than the first day of the regular session of the 75th General Assembly is set forth in House Bill No. 100, such Law shall become effective on the first day of the regular session of the 75th General Assembly. Section 20 of Article III of the Constitution of Missouri provides that the general assembly shall meet in regular session on the first Wednesday after the first day of January following each general election. Since the first day of January, 1969 will be Wednesday, the regular session of the 75th General Assembly will convene on the second Wednesday of January, which will be January 8, 1969, and such date will be the effective date of House Bill No. 100, of the 74th General Assembly.

Section 29 Article III of the Constitution of Missouri provides that no law passed by the General Assembly shall take effect until ninety days after adjournment or after a thirty day recess except appropriation acts or emergency acts. However, such constitutional provision has only the effect of prohibiting an effective date of laws other than appropriation or emergency acts prior to ninety days after adjournment or after a thirty day recess and does not make such laws effective on the ninetieth day after adjournment or after a thirty day recess.

The Supreme Court of Missouri en banc, discussed the provisions of what is now Section 29 of Article III of the Constitution in the Case of State ex rel. Brunjes vs. Bockelman, 240 SW 209, holding that a law may have an effective date at a time later than ninety days after adjournment of the General Assembly at which it was passed stating l.c. 211 and 212:

"The Missouri Constitution (1875, section 36 of article 4) places no inhibition upon the Legislature as to fixing a future date for a law to become effective. It prohibits them from becoming effective upon their passage and approval, except in excepted cases. The Legislature has often asserted its right to pass a law to become effective in the future, and our cases seemingly have approved them. State v. Brassfield, 81 Mo. 151, 51 Am. Rep. 234; State v. Orrick, 106 Mo. 111, 17 S.W. 176, 329; State ex rel. v. Edwards, 136 Mo. 360, 38 S.W. 73."

The salary increase provided for in House Bill No. 100, of the 74th General Assembly will become applicable on January 8, 1969, to all Senators and Representatives including so-called holdover Senators, that is, those Senators elected at the November, 1966, election for four year terms.

We assume, for the purposes of this opinion only, that Senators and Representatives are "state officers" within the meaning of Section 13 of Article VII of the Constitution of Missouri but do not rule on such question in view of our holding that all Senators are entitled to the increased compensation beginning with the effective date of House Bill No. 100. Such Section provides as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

The first sentence of Section 16, Article III of the Constitution contains no limiting language but refers to "senators and representatives" which reference is to all Senators and Representatives and provides they shall receive the compensation provided for in the Constitution "until" otherwise provided by law. When a law is passed fixing the compensation of legislators, the compensation provided for in such law becomes the amount of compensation to which all Senators and Representatives are entitled just as if the amount of such compensation were specifically set forth in the Constitution itself. The obvious intent of Section 16 of Article III is to provide a uniform compensation for all Senators.

The provisions of Section 13, Article VII of the Constitution are in conflict with the provisions of Section 16, Article III of the Constitution under our assumption that legislators are "state officers" because the provisions of Section 13, Article VII purport to prohibit increased compensation for Senators elected in 1966, during the four year terms for which they were elected while the provisions of Section 16, Article III authorize a change of compensation for such Senators beginning January 8, 1969.

When constitutional provisions are in conflict, the rule of construction applicable, is that the most recent amendment of the Constitution prevails. In the Case of State ex inf. McKittrick vs. Bode, 342 Mo., 162, 113 SW2d, 805, the Supreme Court of Missouri en banc held that a constitutional amendment adopted after an existing section of the Constitution prevails where there is a conflict between the two constitutional provisions and held that the amendment in such case constitutes an exception to the previously existing constitutional provision, stating l.c. 808:

"We are familiar with the rule that the provisions of the Constitution should be harmonized. However, if said paragraph is unambiguous and in direct conflict with section 10, 'the amendment must prevail because it is the latest expression of the will of the people.'"

In the Case of State ex rel. Board of Fund Commissioners vs. Holman, 296 SW2d, 482, the Supreme Court of Missouri en banc said l.c. 491:

"And of course 'a clause in a constitutional amendment will prevail over a provision of the constitution or earlier amendment inconsistent therewith, since an amendment to the constitution becomes a part of the fundamental law, and its operation and effect cannot be limited or controlled by previous constitutions or laws that may be in conflict with it.' 16 C.J.S., Constitutional Law, §26, p. 99: State ex rel. Lashly v. Becker, 290 Mo. 560, 235 S.W. 1017, 1020."

Section 13 of Article VII of the Constitution is part of the Constitution of Missouri adopted February 27, 1945, while Section 16, Article III of the Constitution was adopted as an amendment to the Constitution November 8, 1960. Therefore, the provisions of Section 16, Article III prevail over the conflicting provisions of Section 13, Article VII.

Another familiar Rule of construction is that the specific provisions of a Constitution prevail over contrary general provisions, the specific provisions constituting an exception to the contrary general provisions. This Rule is set forth in 16 C.J.S., Section 25, Page 65, as follows:

"When general and special provisions of a constitution are in conflict, the special provisions should be given effect to the extent of their scope, leaving the general provisions to control instances where the special provisions do not apply."

"Where there is a conflicting specific and general provision, or a particular intent which is incompatible with a general intent, the specific provision or particular intent will be treated as an exception, and should receive a strict, but reasonable construction. \* \* \* \*"

Section 16 of Article III relates only to compensation of legislators and is specific while Section 13 of Article VII relates to compensation and terms of state, county and municipal officers, and is general.

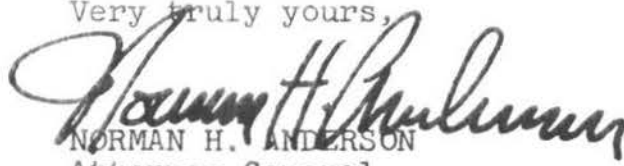
The provisions of Section 16 of Article III, therefore prevail over the provisions of Section 13 of Article VII, insofar as compensation of legislators is concerned.

#### CONCLUSION

It is the opinion of this office that the provisions of House Bill No. 100, of the 74th General Assembly providing for a salary of \$8,400 per year for Senators and Representatives will become effective on the first day of the regular session of the 75th General Assembly, January 8, 1969. All Senators and Representatives including holdover Senators will receive the compensation provided for in House Bill No. 100, beginning on such date.

The foregoing opinion which I hereby approve was prepared by my assistant, Mr. C. B. Burns, Jr.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

October 4, 1967

OPINION NO. 340  
Answered by letter-Downey

Honorable James E. Godfrey, Speaker  
Missouri House of Representatives  
418 Olive Street  
St. Louis, Missouri 63102



Dear Mr. Speaker:

Reference is made to your request for an official opinion concerning the language in the form for articles of incorporation which are made available in the Office of the Secretary of State. You have specifically inquired as to the effect of inserting "none" in the blank space following language in Article Three, which appears to be intended for the purpose of stating stock preferences, restrictions, etc. It has been suggested that the insertion of the word "none" in such blank space has the effect of doing away with the preemptive rights of a shareholder in a corporation.

This office has carefully and thoroughly researched the question which you have propounded, and we do not find any statutory or case law in the State of Missouri from which this office can draw definitive conclusions. As you know, statutory law and case law in Missouri look with favor upon the preemptive rights of shareholders. It is our judgment that any authoritative answer to your question can be made only by a court and that this office cannot render any meaningful opinion to you.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

TJD:db



August 22, 1967

OPINION NO. 341  
Answered by Letter-Birnbaum

Mr. John Harry Wiggins, Supervisor  
Department of Liquor Control  
State Office Building  
Jefferson City, Missouri



Dear Mr. Wiggins:

This is in response to your letter of July 21, 1967, concerning the passage of Senate Bills No. 40, 41 and 42 by the Missouri 74th General Assembly which will become effective October 13, 1967.

Senate Bills 40 and 41 repeal Sections 311.230 and 312.080, RSMo 1959, and Senate Bill 42 repeals Sections 311.555 and 312.235, RSMo Cum. Supp. 1965. These Senate Bills, attached for your convenience, enact new sections relating to the same subject.

The effect generally of this legislation is that certain types of licensees no longer are required to provide a bond as a condition for obtaining a license. In regard to this legislation you stated:

"Two questions now arise in connection with which I must ask your legal opinion:

"1. Since the new laws are not effective until October 13, I assume this Department must continue to require bonds on new applications for liquor and beer licenses during the interim period although this seems a hardship on persons applying during said period. However, the amount of bond to be required is of

Mr. John Harry Wiggins

interest. Should the full amount of the statutory bond be required or should it be only a percentage or pro rata amount until October 13?

"2. The period of license renewals due June 30 of each year has just been completed. All licensees furnished necessary bonds as required by the laws repealed effective October 13. I am now receiving inquiries from both licensees and bonding companies regarding the status of current bonds after October 13. Licensees are asking whether they may be entitled to a pro rata refund on the bonds just furnished for the current year and, if so, whether I will remove the bond from their files and return same to them. Bonding companies are apparently concerned about the same question."

The purpose generally of the bonds as noted in the sections repealed effective October 13, is to provide a means guaranteeing payment of taxes, license fees and inspection costs as well as any fines imposed for violation of the liquor laws. There are no provisions for pro rata or percentage amounts for bonds. The bonds in question are not conditioned on the length of the license period but to protect state interest in seeing that the liquor laws are obeyed. Any license requiring bond issued before October 13, 1967, must comply with the corresponding section of the liquor laws pertaining to that type of license and provide a bond in the full amount indicated therein.

Your second question concerning whether a licensee is entitled to a pro rata refund on bonds furnished for the current year is a private matter between the licensee and his surety or bonding company and for that reason will not be considered in this letter.

Our office has found no legal obligation on your part to return such bonds after the effective date of the Senate Bills.

The bond liability will extend to those violations occurring before the effective date of such bills. However, proceedings for recovery on the bonds may be instituted after the effective date of such bills and therefore, the bonds should remain in your files.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

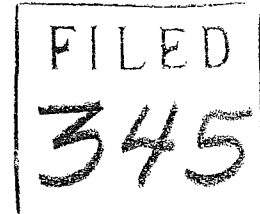
GLB:jf:db

ELEMENTARY AND SECONDARY  
EDUCATION ACT:  
STATE BOARD OF EDUCATION:  
FEDERAL GRANTS:

Review and certification of State Board's  
application for program grant for fiscal year  
1968, to provide educational programs for  
migratory children of migratory agricultural  
workers under Title I, Public Law 89-10 as  
amended by Section 103, Public Law 89-750.

Opinion No. 345  
Answered by Letter (DeFeo)

August 10, 1967



Honorable Hubert Wheeler  
Commissioner of Education  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Wheeler,

Per your request, we have reviewed the Missouri State Department of Education's application for a program grant for fiscal year 1968 for educational programs for migratory children of migratory agricultural workers, Public Law 89-10 as amended by Public Law 89-750.

We have previously held that the State Board of Education is authorized to receive federal grants available under Section 103, Public Law 89-750, and to re-grant or re-distribute the federal funds for the purposes declared by the federal act (Opinion Letter No. 313, Wheeler, 6-21-67). The present application is substantially the same as that which we approved in Opinion Letter No. 313.

We hereby certify that the State Board of Education has authority under state law to perform the duties and functions of a state educational agency as defined under Title I of Public Law 89-10, including those arising under this application for a grant for educational programs for migratory children of migratory agricultural workers, and that the State Board of Education has authority to submit and administer special education programs and projects as set forth in the application.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

By \_\_\_\_\_  
Louis C. DeFeo, Jr.  
Assistant Attorney General

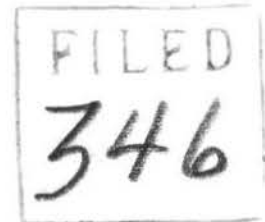
LCD:df

CITIES, TOWNS AND VILLAGES:  
ROADS AND STREETS:

A city may use funds allocated to it under provisions of Article 30(a), Constitution of Missouri, (Motor Fuel Tax) to purchase rights-of-way for street expansion.

OPINION NO. 346

August 10, 1967



Honorable Lloyd J. Baker  
State Representative - 97th District  
Missouri House of Representatives  
R.F.D. 3, Box 150  
Moberly, Missouri 65270

Dear Representative Baker:

This is in reply to your request of August 2, 1967, for an official opinion on the following question:

"May a city use gas tax monies to pay for their share of purchase of Right of Way for a new highway coming into town?"

Your question concerns an interpretation of the following Constitutional Provision (Section 30(a) 1, Article IV, Const. Mo.)

"(2) Fifteen per cent of the remaining net proceeds shall be allocated to the various incorporated cities, towns and villages within the state having a population of more than two hundred according to the last preceding federal decennial census, solely for construction, reconstruction, maintenance, repair, policing, signing, lighting and cleaning roads and streets and for the payment of principal and interest on indebtedness incurred prior to the effective date of this section on account of road and street purposes, and the use thereof being subject to such other provisions and restrictions as provided by law."

It is our opinion that the City of Moberly may properly use its share of the Motor Fuel Use Tax for the purposes of acquiring Rights-of Way in connection with expansion of the state highways within its corporate limits.

In the Case of Reilly et al. vs. Sugar Creek Tp., Harrison County et al. (1940) 139 SW2d 525, the Supreme Court of Missouri held that the statutory authority for a township to issue bonds and use the proceeds in "paying the costs of constructing or improving roads," in such township necessarily carried with it the authority to pay for rights-of-way upon which to build the roads stating l.c. 526:

"If such were not the case the authority to construct roads would be an empty and useless power."

Decision of courts of other states are consistent with this interpretation of the word "construct," e.g:

The statute providing that funds received by municipal corporations from road use tax fund should be used solely for "construction" of roads and streets, authorized a city to use road use tax fund in payment of preliminary engineering services in contemplation of building an expressway through city, as against contention that such services were not sufficiently related to "construction." Slapnicka v. City of Cedar Rapids, 139 NW2d 179, 182 (Ia.)

Cost of utility relocation necessitated by improvement of highways established as part of national system of interstate and defense highways was cost of "constructing" highway within constitutional provisions to effect that revenues received from motor fuel taxes could be used only for constructing public roadways. State v. City of Austin, 381 SW2d 737, 746 (Texas.)

The statutory power given to the State Highway Commission to "construct" highways includes the power to purchase rights-of-way; State v. District Court, 260 P. 134, 138 (Mont.)

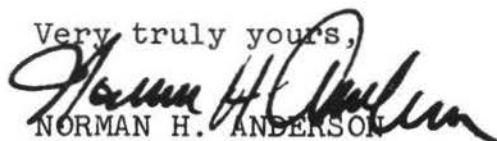
County officer's expenditures of proceeds of sale of county road and bridge bonds for acquisition of state highway rights-of-way was within general statutory limitation of expenditure of such funds for "construction and maintenance of roads and bridges," Rice v. Marcum, 172 SW2d 75, 76 (Ky.)

#### CONCLUSION

It is the opinion of this office that a city may properly use motor fuel tax funds allocated to it under provisions of Section 30(a) 1(2), Article IV, Constitution of Missouri, to acquire rights-of-way in connection with improvement of its roads and streets.

The foregoing opinion of which I hereby approve was prepared by my assistant Mr. Louren R. Wood.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

RECORDS:

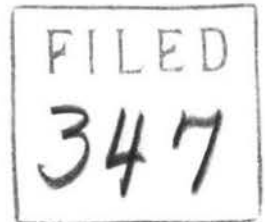
BOARD OF EQUALIZATION:

The records of the county boards of equalization are public records, open to public inspection during business hours, and under such reasonable rules and conditions as proper authority may require.

OPINION NO. 347

October 19, 1967

Honorable Charles B. Adams  
Prosecuting Attorney  
Adair County Courthouse  
Kirksville, Missouri



Dear Mr. Adams:

This opinion is prepared to respond to your question whether any person has the right to examine the records of the county board of equalization.

Section 109.180, RSMo Supp. 1965, reads as follows:

"Except as otherwise provided by law, all state, county and municipal records kept pursuant to statute or ordinance shall at all reasonable times be open for a personal inspection by any citizen of Missouri, and those in charge of the records shall not refuse the privilege to any citizen. Any official who violates the provisions of this section shall be subject to removal or impeachment and in addition shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding one hundred dollars, or by confinement in the county jail not exceeding ninety days, or by both the fine and the confinement."

This section (supra) declares all records of the state, county and municipalities to be "public records" except where otherwise provided by law. Public records are available for public inspection during business hours and under reasonable circumstances.

A careful reading of the statutes creating the board of equalization and enumerating its powers and functions do not provide for a cloak of confidentiality.



Honorable Charles B. Adams

We see no distinction to be made between an inquiring newspaper reporter and a private citizen when the subject of inquiry is a "public record."

Accordingly, we conclude the records of the county board of equalization are public records available for public inspection subject to this right being exercised during business hours and under such reasonable rules and conditions as may be imposed by proper authority.

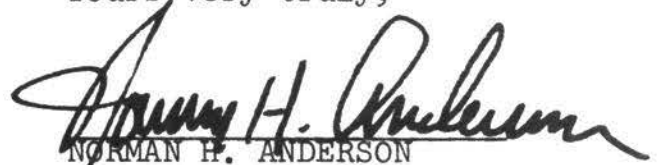
CONCLUSION

It is our opinion that:

The records of the county board of equalization are public records open to public inspection pursuant to Section 109.180, RSMo Supp. 1965.

The foregoing opinion, which I hereby approve, was prepared by my assistant Richard C. Ashby.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

VOTERS:  
REGISTRATION:  
ELECTIONS:  
LEGISLATION:  
RACE, DESCRIPTION OF:

House Bill No. 136, enacted by the Seventy-Fourth General Assembly, signed by the Governor on May 2, 1967, amending Section 117.330, RSMo 1959, to delete the item "White Colored" from the Affidavit of Registration, does not repeal that portion of Section 117.300 which requires the registration officer to note on the Application for Registration whether the applicant is White or Colored without inquiry where such is apparent.

OPINION NO. 348

November 2, 1967

Mr. Fred A. Murdock, Chairman  
Board of Election Commissioners  
1331 Locust Street  
Kansas City, Missouri 64106



Dear Mr. Murdock:

Your request for an opinion reads as follows:

"House Bill No. 136 enacted by the 74th General Assembly and signed into law by the Governor on May 2, 1967, repealed Section 117.330, R.S. Mo., 1959, and enacted a new Section 117.330 in lieu thereof. The new section thus enacted is identical to the section repealed except that it omits all reference to race from the form of the affidavit of registration. It is our understanding that the sponsors of the bill intended to eliminate reference to race from all registration records prepared and maintained by this board; however, Section 117.300, R.S. Mo., 1959, was not amended in any respect, and subsection 3 thereof requires the registration officer to 'note on the application for registration the sex of the applicant, and whether the applicant is white or colored, without inquiry where such is apparent.' You will note that the affidavit of registration and the application for registration are separate and distinct forms."

Mr. Fred A. Murdock

"Under these circumstances, we respectfully request your opinion whether the Board is required to continue to note the applicant's color on the application for registration."

As indicated in your request, we have two forms to consider. Each of these forms has been prescribed by the legislature. We quote the portion of Paragraph 2 of Section 117.300, RSMo 1959, wherein the form of application for registration is prescribed:

"(2) Every person who applies for registration, unless unable to write or for other good reasons is unable to do so, shall make out, sign and present to the registration officer an application for registration on an application blank substantially as follows:

Notice: If you are already registered in (name of city) and have changed your residence, do not make out this application for registration. Make out an application for transfer of registration.

#### APPLICATION FOR REGISTRATION

(Fill in with pen and ink. Do not use pencil)

1. My full name is .... (First name)....  
(Middle Name)....(Last or surname) ....
2. I reside at ....(Street or Number)....  
(Name of Street)
3. Floor .... Apartment .... Room No. ....  
(Fill in the above if they apply)
4. I have resided continuously at the above address since .....  
Month Day Year  
(The above may be answered by 'life', if such is the case)
5. I was born in .... on .....  
(Name of state or county)  
Day .... Month..... Year.....
6. Date of application .....

I hereby certify that I am a citizen of the United States, that I am not at present registered in (name of city), that on the day of the next succeeding election I shall be at least twenty-one years of age, and a resident of the state of Missouri for at least one year and (name of city)

Mr. Fred A. Murdock

for at least sixty days immediately preceding the election, that to the best of my knowledge, I shall be qualified to vote, and that the above statements are true.

.....  
Signature of voter

This application must be presented in person to two officers of opposite political faith in charge of registration. It does not complete your registration. It is also necessary for you to take oath and sign the affidavit of registration.

Received by .....  
Signatures of registration officers."

Paragraph 3 of Section 117.300 includes the requirement that:

"\* \* \*The said registration officer shall note on the application for registration the sex of the applicant, and whether the applicant is white or colored, without inquiry where such is apparent. The said registration officer shall also enter any additional notations on the said application where such may be necessary or convenient. \* \* \*"

The form of affidavit of registration as prescribed in Section 117.330, RSMo 1959, is as follows:

			RESIDENCE			
			Street	No.	Floor, Apt. or Room	Precinct
Last name	First Name	Second				
Date of start of residence & present address.....						
Male	Female.....					
White	Colored.....					
Birthplace.....						
Date of birth:						
Day .....						
Month.....						
Year.....						

Mr. Fred A. Murdock

\_\_\_\_\_  
"If naturalized: Name of

Court.....

Place..... Date.....

Through whom naturalized:

Husband

Father Name.....

Remarks

#### AFFIDAVIT OF REGISTRATION

State of Missouri,) ss.  
County of \_\_\_\_\_)

I hereby swear (or affirm) that I am a citizen of the United States, that on the day of the next succeeding election I shall be at least twenty-one years of age, and shall have resided in the state of Missouri one year and in the city sixty days immediately preceding the election, and that I am legally qualified to vote.

Subscribed and sworn to before me this \_\_\_\_ day of \_\_\_\_\_.

\_\_\_\_\_  
Signature of voter.

\_\_\_\_\_  
Signature of registration officer.

#### VOTING RECORD

Stamp or write the date of each election at which the voter votes on the first vacant space.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Mr. Fred A. Murdock

As stated in your request, the legislature in House Bill No. 136 repealed Section 117.330, and in lieu thereof enacted a new Section 117.330, which deleted the item "White Colored" from the form of affidavit of registration. Your question, therefore, is whether the legislature by repealing that portion of Section 117.330 to delete all reference to race in the form of affidavit of registration, also repealed a portion of Section 117.330 to delete all reference to race in the form of application for registration.

There is no express provision in House Bill No. 136 repealing any portion of Section 117.300. It follows, therefore, that House Bill No. 136 did not repeal any portion of Section 117.300 unless it did so by necessary implication.

Well-established rules of law governing the repeal of statutes by implication are found in State v. Malone, 192 SW 2d 68, 1.c. 70. In that case the court stated:

"[2] Repeal of statutes by implication is not favored. State ex rel. St. Louis Police Relief Ass'n v. Igoe, 340 Mo. 1166, 107 S.W. 2d 929; Graves v. Little Tarkio Drainage Dist. No. 1, 345 Mo. 557, 134 S.W. 2d 70; Coleman v. Kansas City, 348 Mo. 916, 156 S.W. 2d 644; Lajoie v. Central West Casualty Co. of Detroit, 228 Mo. App. 701, 71 S.W. 2d 803.

[3] The repeal of a statute by a subsequent statute is a question of intention, and there is a presumption against the intention to repeal where express terms are not used. State ex rel. St. Louis Police Relief Ass'n v. Igoe, supra.

[4] If by any fair interpretation all the sections of the statutes can stand together, there is no repeal by implication. Hull v. Baumann, 345 Mo. 159, 131 S.W. 2d 721.

[5] An act may be repealed by necessary implication, if a later act is so repugnant to the former that the two cannot stand, even though no mention is made of the former act in the later. Vining v. Probst, Mo. App., 186 S.W.2d 611.



Mr. Fred A. Murdock

[6] But though two acts are seemingly repugnant they must, if possible, be so construed that the later will not operate as a repeal, by implication, of an earlier one and if they are not irreconcilably inconsistent, both must stand. Graves v. Little Tarkio Drainage District No. 1, supra."

This case has been cited with approval in Rosebraugh v. State Social Security Commission, 196 S. W. 2d 27, 1.c. 31:

"[7,8] It is well settled that repeal by implication is not favored and if by any fair interpretation the sections of the statute can stand together there is no repeal by implication. It may be further said that the repeal of a statute, or any part thereof, by a subsequent statute is a question of intention on the part of the Legislature and there is a presumption against the intention to repeal where express terms to that effect are not used. State v. Malone, Mo. App., 192 S.W. 2d 68, and cases there cited."

In view of these rules, the real question for consideration is whether there is such repugnancy between the provisions of Section 117.300 which requires the registration officer to note on the application for registration whether the applicant is white or colored, and the provisions of Section 117.330 as amended by House Bill No. 136 which deletes all reference to color from the affidavit of registration, that the two sections cannot be harmonized and effect given to both.

The two statutes are part of the registration law and in that respect deal with the same subject matter. But, it is in different ways and for different purposes. Paragraph 8 of Section 117.300, provides that:

"The application for registration shall be filed alphabetically and shall constitute a permanent master file record of all persons applying for registration under this law.

The first sentence of Section 117.340 states:

"The original affidavits of registration shall be filed by precincts and shall constitute the precinct register of voters."

Mr. Fred A. Murdock

Inasmuch as the legislature has specified not only what information the application must contain but also the manner in which the information is to be preserved, it is clear that the application must contain all information required by Section 117.300. Accordingly there is no inconsistency or incompatibility between Section 117.300 which relates to the application and Section 117.330 which relates to the affidavit and both of these statutes can be given force and effect.

#### CONCLUSION

It is the opinion of this office that House Bill No. 136, Seventy-fourth General Assembly which amended Section 117.330, RSMo 1959, to delete the item "White Colored" from the affidavit of registration, did not by implication repeal that portion of Section 117.300, RSMo 1959, which requires the registration officer to note on the application for registration whether the applicant is white or colored without inquiry where such is apparent.

The foregoing opinion, which I hereby approve, was prepared by my assistant L. J. Gardner.

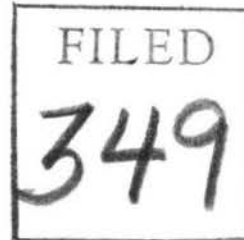
Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

October 18, 1967

OPINION NO. 349  
Answered by letter-Mansur

Honorable William R. (Bill) Royster  
State Representative - 8th District  
Missouri House of Representatives  
3500 Gladstone Boulevard  
Kansas City, Missouri 64123



Dear Representative Royster:

Recently you inquired of this office whether a city marshal in a fourth class city at a salary of \$1.00 per month could accept an appointment as a deputy constable at a salary of \$350.00 per month.

We are enclosing herewith an opinion issued by this office on November 17, 1950, to Honorable J. Logan Marr, Prosecuting Attorney, Morgan County, Versailles, Missouri, holding that a deputy sheriff may hold the office of city marshal at the same time and receive the compensation for each office.

We are also enclosing an opinion issued by this office on January 16, 1941, to Fred Keller, Sheriff, Andrew County, Savannah, Missouri, holding that a constable may be appointed as a deputy sheriff and fill both offices at the same time.

These opinions are based on the rule of law that, absent a statute to the contrary, a person may hold two public offices at the same time so long as the duties to be performed are not incompatible, repugnant or conflicting.

It is our opinion that the duties of city marshal of a fourth class city are not incompatible with the duties of a deputy constable of a first class county and that the same person may hold

Honorable William R. Royster

both offices at the same time and receive the compensation for each office. This is based on the assumption that such person is otherwise qualified for each office.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

MM:db

Enclosures: Op.No. 57, Marr, 11-17-50  
Opinion to Keller, 1-16-41

ELECTIONS: 1. As used in Section 129.060, RSMo 1959, providing that  
VOTING: no deduction shall be made from an employee's "usual  
WAGES: salary or wages" when he absents himself from employment  
for a maximum of three hours on election day, the quoted  
words refer to an amount received on a typical working day, and cannot be construed to indicate the usual hourly rate of wages. 2. Under a union contract requiring additional compensation for hours in excess of 7 1/2 worked in one day, and where an employee has previously worked nine (9) hours a day for over a year, any employer who excuses the employee to vote on election day after he has worked 8 1/2 hours, is required to pay such employee his usual salary or wages of 7 1/2 hours straight time pay plus 1 1/2 hours of overtime pay in accordance with Section 129.060, RSMo 1959.

OPINION NO. 357

September 21, 1967

Honorable Thomas A. Walsh  
State Representative, 52nd District  
Local No. 1, IBEW  
5850 Elizabeth Avenue  
St. Louis, Missouri 63110



Dear Representative Walsh:

This is to acknowledge receipt of your request for an official opinion from this office which reads in part as follows:

"The question presented is this: Where an employee is regularly scheduled to work overtime and is granted one-half hour absence from work to vote for which one-half an hour he would have been paid at an overtime rate had he actually worked, is an employer required to pay the employee for the one-half hour at an overtime or a straight time rate?

\* \* \* \* \*

Let me provide a specific example of how the issue arises. An employer has had a crew on a construction job regularly working 9 hours a day, for more than a year, at least 5 days a week. The union contract provides for a 7 1/2 hour regular work day and 37 1/2 hour regular work week. It provides that an overtime rate (doubletime) be paid for all work in excess of 7 1/2 hours per day or outside of the regular Monday through Friday work week. On election day the employee is scheduled for his usual 9 hour day. The polls are open from 7 A.M. to 7 P.M. He is scheduled to work from

Honorable Thomas A. Walsh

7 A.M. to 4:30 P.M. (with one-half hour off for an unpaid lunch period). He properly requests and is entitled to take off one-half hour early in the afternoon to vote and does vote, having left the job at 4 P.M. It is undisputed by anyone that the employee is entitled to his wages for the one-half hour that he took off from work. Had he worked as scheduled, he would have received 7 1/2 hours of straight time pay plus 1 1/2 hours of overtime pay.

Should the employer pay the employee for the one-half hour at straight time, which means that the employee would receive 8 hours of straight time pay and one hour of overtime pay; or should the employer pay the employee for the one-half hour at the overtime rate, which means the employee would receive 7 1/2 hours straight time pay plus 1 1/2 hours overtime pay?"

The precise issue with which we are concerned is the effect of overtime rates on Section 129.060, RSMo 1959, which reads in part as follows:

"1. Any person entitled to vote at any election held within this state, or any primary election held in preparation for such election, shall, on the day of such election be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of three hours between the time of opening and the time of closing the polls for the purpose of voting; and any absence for such purpose shall not be sufficient reason for the discharge of or the threat to discharge any such person from such services or employment; and such employee, if he votes, shall not, because of so absenting himself, be liable to any penalty, nor shall any deduction be made on account of such absence from his usual salary or wages;  
\* \* \* "

The essence of the above statute is to guarantee an employee the right to vote at any election without deductions being made from his "usual salary or wages." It has been stated that the purpose or intent of this provision is to "eliminate any penalty for exercising the right of suffrage and to remove a practical obstacle to getting out the vote." Day-Brite Lighting, Inc. vs. State of Missouri, 362 Mo. 299, 240 S.W. 2d 886.



Honorable Thomas A. Walsh

Relating these principles to the question and example presented, the "usual salary or wages" of an employee not voting and remaining at his employment for the accustomed nine <sup>(9)</sup> hours, would include 7 1/2 hours straight time pay plus 1 1/2 hours overtime pay. Therefore, any employee who works for eight and one-half (8 1/2) hours and takes off the one-half hour allowed him to vote in this instance by Section 129.060, supra, is also guaranteed by such section to receive his usual salary or wages; viz., to be paid the amount he would have received had he worked. This proposition is clearly spelled out in the Day-Brite Lighting case, cited supra, where the following statement is made at 240 S.W. 2d, page 886:

"The intentment of statute penalizing an employer who fails to allow an employee, entitled to vote, to absent himself on election day for a period of four hours between times of opening and closing of the polls is that employee shall be paid during his authorized absence as though he had worked."

Thus, if the employee had worked, he would receive as his usual salary or wage 7 1/2 hours of straight time pay plus 1 1/2 hours of overtime pay, since he had previously been working nine (9) hours a day for over a year.

It may be argued that the phrase "usual salary or wages" refers to an employee's usual hourly rate of wages; i.e., straight time as distinguished from overtime, for the hours taken off to vote. This question has been decided by the New York State Courts in the case of Williams vs. Aircooled Motors, 127 N.Y.S. 2d 135, 283 App. Div. 187, affirmed by the New York Court of Appeals, 121 N.E. 2d 251, 307 N.Y. 332. The following statement is taken from the decision rendered by the appellate division at page 137:

"[1-3] We think that 'the usual salary or wages' referred to in §226 is the amount received on a typical working day, and cannot be construed to indicate the usual hourly rate of wages. There seems to be no adequate reason for departing from the statutory language. The purpose of the statute is clearly to encourage voting, to make it financially immaterial to a voter whether he works or takes time off to vote. This requires that he be paid on election day precisely what he would have earned had he remained on the job for nine hours. Election day is the unusual day; the normal

Honorable Thomas A. Walsh

work day determines an employee's 'usual salary or wages,' from which a deduction is prohibited. \* \* \* "

Thus, to interpret the statute any other way would discriminate against all workers employed at an hourly rate rather than by the day or week. Also, it would penalize an employee the difference between straight time and overtime, because he chose to exercise his elective franchise. We do not believe that the Legislature intended such a result. See *Lee vs. Ideal Roller & Manufacturing Co.*, 92 N.Y.S. 2d 726.

#### CONCLUSION

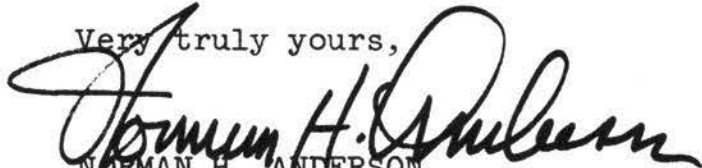
It is the opinion of this office that:

1. As used in Section 129.060, RSMo 1959, providing that no deduction shall be made from an employee's "usual salary or wages" when he absents himself from employment for a maximum of three hours on election day, the quoted words refer to an amount received on a typical working day, and cannot be construed to indicate the usual hourly rate of wages.

2. Where, under a union contract requiring additional compensation for hours in excess of 7 1/2 worked in one day, and where an employee has previously worked nine (9) hours a day for over a year, any employer who excuses the employee to vote on election day after he has worked 8 1/2 hours, is required to pay such employee his usual salary or wages of 7 1/2 hours straight time pay plus 1 1/2 hours of overtime pay in accordance with Section 129.060, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, B. J. Jones.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

SCHOOL BOARDS:  
ELECTIONS:  
"LARGEST NUMBER OF VOTERS:"

The phrases "greatest number of votes" and "largest number of votes" under House Bill No. 425, the 74th General Assembly requires candidate for director of Kansas City Public School District to receive plurality but not majority of votes cast.

November 9, 1967

OPINION NO. 359

Honorable R. D. "Pete" Rodgers  
State Representative - District 9  
Missouri House of Representatives  
333 South Elmwood  
Kansas City, Missouri 64124



Dear Representative Rodgers:

This official opinion is rendered in response to your request of August 6, 1967, for a ruling of this office.

Your inquiry relates to House Committee Substitute for House Bill No. 425 as enacted by the Seventy-fourth General Assembly. This enactment amends the statutes applicable to elections of school districts of the Kansas City Public School District.

Subsection 3 of Section 162.492 of the Bill states in part as follows:

" \* \* \* The six candidates, one from each of the subdistricts who receive the greatest numbers of votes cast at the election shall be elected and the at-large candidate receiving the greatest number of votes shall be elected.  
\* \* \* In those years in which one at-large director is to be elected each voter may vote for one candidate and the candidate receiving the largest number of votes cast shall be elected. In those years in which two at-large directors are to be elected each voter may vote for two candidates and the two receiving the largest number of votes cast shall be elected."

Subsection 4 of Section 162.492 reads in part as follows:

" \* \* \* The six candidates, one from each of the subdistricts, who receive the greatest number of votes cast at the election shall be elected. \* \* \* "

You ask whether the phrases "largest number of votes" and "greatest number of votes" mean a plurality or a majority of the votes cast.

It is a general principle of law, applicable to elections, that in the absence of a statute or constitutional provision expressly requiring more, a plurality of votes is sufficient for a candidate to be elected. 29 C.J.S., Elections, Section 241. House Bill 245 does not expressly require a candidate to receive more than a plurality of the votes cast at the election.

The phrase "greatest number of votes" has been dealt with by courts in other states. In the case of State ex rel. Pray et al. v. Yankee, Wis., 109 N.W. 550, the Supreme Court of Wisconsin had before it the following facts: 46 votes were cast for the office of county treasurer, 22 votes were cast for the relator, other candidates each received fewer votes than the relator. The state statute in question provided "the person receiving the greatest number of votes at a primary as a candidate of a party for an office shall be the candidate of that party for such office..." The court found the relator to have the plurality of the votes cast for county treasurer in the primary and held him to be the lawful candidate. It is to be noted from the facts that although the relator had a plurality of the votes cast, he did not have a majority. In the case of Edward v. Daigle et al., La. 10 So.2d 209, a reading of the opinion of the Supreme Court of Louisiana reveals that the court there also understood the phrase "greatest number of votes" to mean a plurality of the votes.

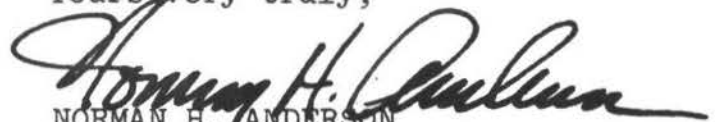
House Bill 425 would permit any number of candidates for each office. If there were more than two candidates, it would be possible that no one candidate would receive a majority of the votes cast. If the phrases "greatest number of votes" and "largest number of votes" were interpreted to require a majority for election, it would be possible for an election to be held and no candidates elected to office. House Bill 425 makes no provision for such a circumstance and it is unreasonable to assume that the legislature intended the election to result in a nullity.

#### CONCLUSION

Therefore, it is the opinion of this office that the phrases "greatest number of votes" and "largest number of votes" as used in Subsections 3 and 4 of Section 162.492 of HCSHB No. 425 of the Seventy-fourth General Assembly require a candidate for director of the Kansas City Public School District to receive a plurality of the votes cast and do not require a candidate to receive a majority of the votes cast in order to be elected.

The foregoing opinion which I hereby approve was prepared by my assistant, Louis C. DeFeo, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

October 3, 1967



OPINION NO. 362  
Answered by Letter (Chitwood)

Honorable James A. Noland  
State Representative  
140th District  
Osage Beach, Missouri

Dear Representative Noland:

This office is in receipt of your request for our legal opinion upon the status of a bill passed by both houses of the General Assembly, which was not approved, vetoed or returned by the Governor within the time limit set out in the Constitution of Missouri. Your specific inquiry reads as follows:

"Does this bill die as though it were vetoed, or does it become law at the expiration of the period allowed the governor to act on the bill?"

Article 3, Section 31, Constitution of Missouri, provides the procedure that shall be followed after all bills and joint resolutions have passed both houses of the General Assembly, and reads as follows:



Honorable James A. Noland

"Section 31. All bills and joint resolutions passed by both houses shall be presented to and considered by the governor, and within fifteen days after presentation he shall return them to the house of their origin endorsed with his approval or accompanied by his objections. If the bill be approved by the governor it shall become a law. When the general assembly adjourns, or recesses for a period of thirty days or more, the governor may return within forty-five days any bill or resolution to the office of the secretary of state with his approval or reasons for disapproval."

Article 3, Section 32, Constitution of Missouri, provides what procedure shall be followed after a bill has been vetoed and returned to the General Assembly by the Governor. We merely mention this section without discussion in passing, since it has no direct bearing upon the matter of inquiry.

Article 3, Section 33, Constitution of Missouri, provides the procedure to be followed when the Governor fails to return a bill. This section is applicable to the factual situation referred to in the opinion request, and we quote said section as follows:

"Section 33. Whenever the governor shall fail to return a bill presented to him as required by this constitution, the general assembly by joint resolution reciting the fact of such failure and the bill at length, may direct the secretary of state to enroll the bill as an authentic act and it shall become a law; provided that such joint resolution shall not be submitted to the governor for his approval."

The effect of Section 33 supra, is that upon the failure of the Governor to return a bill to the General Assembly with his approval or reasons for disapproval within the time prescribed by Section 31 supra, the General Assembly may by joint resolution, reciting the Governor's failure, and the bill at length, direct the secretary of state to enroll the bill as an authentic act and it shall become a law. Such joint resolution is not required to be submitted to the Governor for his approval.



Honorable James A. Noland

Our answer to your inquiry is that a bill passed by both houses of the General Assembly and presented to the Governor, who fails to approve, veto or return the bill within the time provided by Article 3, Section 31, Constitution of Missouri, does not die at the expiration of such period. Such bill does not become a law at the end of such period of time when not acted upon or returned by the Governor. The bill may thereafter become a law only when the General Assembly follows that procedure provided by Article 3, Section 33, Constitution of Missouri, the various steps of which we have discussed in the last preceding paragraph herein.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

ENC:fb

October 30, 1967



Honorable Thomas O. Pickett  
Prosecuting Attorney  
Grundy County  
924 Main Street  
Trenton, Missouri

Dear Mr. Pickett:

Further reference is made to your letter of August 16, 1967, requesting our opinion on the question whether a county owning real estate in another county may dispose of such real estate by an auction held in the county where the land is situated, or whether the county court may take sealed bids on such land.

Section 49.270, RSMo 1959, provides that the county court shall have control and management of, and authority to sell any real estate belonging to the county.

Section 49.285, RSMo Supp. 1965, provides that a county owning real estate in another county, other than an adjoining county, must dispose of it within five years from October 13, 1963, or after five years from the date of acquisition of the real estate, whichever date last occurs. If the county fails to dispose of such real estate within that time, the sheriff of the county in which the land is located shall take possession of the real estate and sell it at public auction in the manner prescribed for partition sales.

We agree with you that during the five-year period from October 13, 1963, or from the date of acquisition whichever is later the county may dispose of the land under either of the methods mentioned in your question.

Yours very truly,

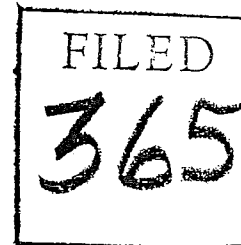
NORMAN H. ANDERSON  
Attorney General

POLITICAL SUBDIVISIONS:  
PUBLIC WATER SUPPLY DISTRICTS:  
TAXATION:  
    EXEMPTIONS  
    SALES TAX

The 1965 Amendments to Chapter 144 do not relieve a public water district formed under the provisions of Section 247.010 et seq. RSMo 1959 from collecting sales tax from domestic, commercial or industrial consumers to whom it sells water and remitting the same to the Department of Revenue.

OPINION NO. 365

October 26, 1967



Honorable Paul McGhee  
Prosecuting Attorney  
Stoddard County  
16 North Elm Street  
Dexter, Missouri 63841

Dear Mr. McGhee:

This is in answer to your request for an opinion of this office which reads as follows:

"I respectfully request your official opinion as to whether a public water supply district organized under the provisions of Sections 247.010 et seq. RSMo 1959 must collect sales tax from the persons to whom it sells water within its district, and remit the same to the State."

Section 39 of Article III of the Missouri Constitution, 1945, provides:

"The general assembly shall not have power:

\* \* \* \* \*

(10) To impose a use or sales tax upon the use, purchase or acquisition of property paid for out of the funds of any county or other political subdivision."

This office in Opinion No. 109 written to the Honorable Don R. Ferry, Prosecuting Attorney for Vernon County on April 25, 1967, held, that the proper definition of the term "other political subdivision" as used above is found in Section 15, Article X of the Missouri

Honorable Paul McGhee

Constitution, and includes public water supply districts formed under the provisions of Sections 247.010 through 247.220, RSMo 1959, as amended.

Section 144.020-1(3), RSMo Supp. 1965, imposes upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable services at retail in this state "A tax equivalent to three per cent of amounts paid or charged on all sales of electricity or electric current, water and gas, natural or artificial, to domestic, commercial or industrial consumers."

Prior to 1965, in an opinion written on October 29, 1946, to the Honorable E. F. Bertram, Representative of Scotland County, this office held that the constitutional prohibition did not forbid collection of tax on sales of electrical current and water by a municipally owned light and water plant because the taxes were paid by the consumer, and the plant merely acted as the agent or conduit through which the state sought to facilitate the accounting for and the collection of the tax from the purchaser of light and water who is the taxpayer.

However as a result of the decision of Automagic Vendors, Inc. v. Morris, Mo.Banc., 386 S.W.2d 897, and Automatic Retailers of America, Inc., v. Morris, Mo.Banc., 386 S.W.2d 901, Chapter 144 was amended changing it from a "sales" tax to a "gross receipts" tax. The tax is no longer imposed upon the buyer, but upon the seller for the privilege of engaging in business. Sections 144.020, 144.021 and 144.080, RSMo Supp. 1965. But in our opinion this change does not relieve a political subdivision from the duty of collecting and paying the tax.

It is clear that the provisions of Chapter 144, as amended, are still applicable to sales by a public water supply district. The tax still is imposed upon all "persons" engaged in selling water to domestic, commercial or industrial consumers. Section 144.020-1(3), RSMo Supp. 1965. No change was made in Section 144.010-1(5) which includes political subdivisions within the definition of the word "persons". Although the tax is now imposed upon the seller based upon his gross receipts the seller still is required to collect and the buyer to pay the tax under the bracket provisions of Section 144.285, RSMo Supp. 1965.

Nor do we think the obvious legislative intent to include political subdivisions within the requirements of Chapter 144 is frustrated by the constitutional prohibition. There is no "use purchase or acquisition of property" by the water supply district in this case, and since the incidence of the tax falls upon the consumer, the taxes are not "paid for out of the funds of any \* \* \* political subdivision".

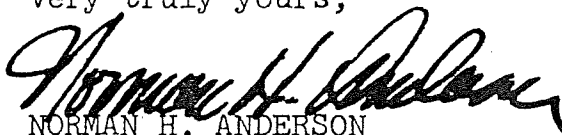
Honorable Paul McGhee

CONCLUSION

The 1965 Amendments to Chapter 144 do not relieve a public water district formed under the provisions of Section 247.010 et seq. RSMo 1959 from collecting sales tax from domestic, commercial or industrial consumers to whom it sells water and remitting the same to the Department of Revenue.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John H. Denman.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General

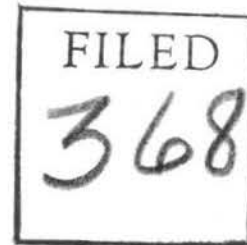
Enclosures - Opinion No. 109  
4/25/67 - Ferry

Opinion No. 7  
10/29/46 - Bertram

August 28, 1967

OPINION NO. 368  
Answered by letter-Mansur

Mr. Herbert C. Clare  
Regional Program Director  
Federal Water Pollution  
Control Administration  
601 East 12th Street  
Kansas City, Missouri 64106



Dear Mr. Clare:

In response to your memorandum dated July 24, 1967, concerning water quality standards, we wish to advise you that it is our opinion that the Missouri Water Pollution Board has legal authority to adopt water quality standards, and this authority is derived from Sections 204.080; 204.090; and 204.100, Revised Statutes of Missouri, 1959.

Further, it is our opinion that the Missouri Water Pollution Board has legal authority to enforce water quality standards, and this authority is derived from Sections 204.100; 204.170; 204.120; 204.040; 204.050; 204.060, Revised Statutes of Missouri, 1959.

The Missouri Water Pollution Board has adopted water quality standards for all interstate streams, and on April 15, 1967, the Missouri Water Pollution Board adopted a state plan for implementation and enforcement of water quality standards. You have been furnished certified copies of the implementing resolution. If you require additional copies, they are available from the Executive Secretary of the Missouri Water Pollution Board.

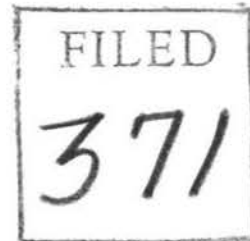
Yours very truly,

NORMAN H. ANDERSON  
Attorney General

MM:db



December 6, 1967



OPINION NO. 371  
Answered by letter-Denman

Honorable John E. Downs  
State Senator  
34th District  
304 Corby Building  
St. Joseph, Missouri

Dear Senator Downs:

This is in answer for your request for an opinion of this office as to the ownership of Bean Lake. As we stated in Opinion Request No. 242 from the Honorable John A. Callow, Representative from Holt County, answered by letter July 1, 1965, this office is not able to determine the ownership of such lakes as such a determination is dependent upon the resolution of several factual questions including the time the particular lake was formed and whether or not it was navigable at the time of its formation. Even if it were possible for this office to ascertain those facts, any meaningful decision would have to be made by a court of competent jurisdiction upon consideration of all of the evidence.

The law governing the vesting of title to bodies of water is well settled. See *Conran v. Girvin*, Mo.Sup., 341 S.W.2d 75. Generally, when additional states are admitted into the Union, title to land under all navigable waters within such states is reserved by the individual states. But if the waters are not navigable in fact, the title of the United States to the land underlying them remains unaffected by the formation of the new state. *United States v. Oregon*, 295 U.S. 1, 79 L.Ed. 1267, 55 S.Ct. 610; 56 Am.Jur., Waters, Section 450-456.

In the case of *Schreve v. Boyle*, which was not appealed, the Circuit Court of Buchanan County found that although Lake Contary, also in Buchanan County, was formed prior to 1821 when Missouri was admitted into the Union, the lake was navigable at that time and title thereto passed to the state.

Honorable John E. Downs

We also have received other information that some of the Missouri River oxbow lakes were formed in the late 1890's during the great floods at that time.

If we assume that Bean Lake was formed after Missouri became a state, since the Missouri River is a navigable river, Peterson v. City of St. Joseph, 156 S.W.2d 691, title thereto vested in the state. If the lake was formed prior to the time of statehood, and, like Lake Contrary, the waters were navigable at the time of admittance, again Missouri would obtain title to the lake, unless it had previously been granted to private individuals by the Federal Government.

The question has been raised as to whether title to the lake bed, if vested in the state, has been transferred to Buchanan County by Sections 241.290 and 241.300, RSMo. These sections provide that lands of the state formed by recession and abandonment of their waters of old beds of lakes and rivers shall be transferred to the county in which they are located. It is our opinion that by these sections the state has conveyed only lands which have been formed by the recession and abandonment of their waters of the old beds of lakes and rivers. Since, Bean Lake still exists as a lake, no abandonment has ~~taken~~ place and title to the land under the waters of the lake still remains in the State of Missouri.

It is my understanding that the lake is being filled by silt, and the reason for your request is that persons living in the vicinity of Bean Lake have asked the State Park Board for aid in maintaining the recreational qualities of the lake by dredging or other appropriate means. If we assume that the waters of Bean Lake were navigable at the time Missouri became a state, in our opinion, title thereto vested and remains in the state; and we see no reason why the Park Board could not act to prevent the lake from becoming useless as a public recreational facility.

We also enclose herewith ~~cc~~ certain inter-office memoranda discussing the question of title to such lakes which might be of help.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

JHD:maw

Enclosures - 2  
Opinion No. 242  
7-1-65 Callow

November 17, 1967

OPINION NO. 372  
Answered by letter-Nowotny

Honorable Haskell Holman  
State Auditor  
State of Missouri  
State Capitol Building  
Jefferson City, Missouri



Dear Mr. Holman:

This is in answer to your request for an opinion of this office concerning the question of whether the State Auditor has the authority to audit the records of the City of Holden pertaining to the construction of a community building being built by the City of Holden with money received from a residuary bequest of an individual.

You have enclosed copies of the: (1) Will; (2) Final Settlement of the Probate Court; (3) Circuit Court Decree; (4) Inheritance Tax Appraiser's Report; (5) Minutes of the City Council pertaining to the Hallar Memorial Building Fund; and, (6) Cancelled Checks transferring money to the City of Holden.

The authority for an audit of Holden is found in Section 29.230, RSMo Supp. 1965, which reads in part as follows:

"2. The state auditor shall audit any political subdivision of the state, including counties having a county auditor, if requested to do so by a petition signed by five per cent of the qualified voters of the political subdivision determined on the basis of the votes cast for the office of governor in the last election held prior to the filing of the petition. The political subdivision shall pay the actual cost of audit. No political subdivision shall be audited by petition more than once in any one calendar or fiscal year."

Honorable Haskell Holman

You have informed us that you have been requested by a petition signed by five per cent of the qualified voters of Holden, Missouri, to audit that city.

The applicable part of the will dated July 18, 1956, providing for the community building provides as follows:

"I would like for a committee out of the bank to take out enough to provide a public meeting place for the public for the town."

On April 7, 1960, the Circuit Court of Johnson County, Missouri, entered a decree construing the will said decree reading in part as follows:

"(n) Comes now City of Holden, a municipal corporation, as aforesaid, and offers evidence from which the Court finds and determines that a sum necessary to provide a public meeting place for the public of the City of Holden, a municipal corporation, as the deceased had in mind and contemplated should be provided and such a meeting place as would be comparable to similar public meeting places in towns and cities in the same class as the City of Holden, a municipal corporation of the third class, will require the sum of One Hundred Thousand Dollars (\$100,000.00); and accordingly, the Court doth now and here make the specific finding, and decrees that the amount which the deceased testator, Mary Mabel Hallar, intended to and did in fact bequeath and devise to the said City of Holden, a municipal corporation, in her will as being the sum which, 'I would like for a committee out of the bank to take out enough to provide a public meeting place for the public for the town,'; was in truth and fact the sum of One Hundred Thousand Dollars (\$100,000.00) and hence the Court now determines and decrees that the aforequoted bequest as set forth in the will of the deceased was in fact and law a bequest to the City of Holden, a municipal corporation, of Johnson County, Missouri, in the sum and amount of One Hundred Thousand Dollars (\$100,000.00).

\* \* \* \* \*

Honorable Haskell Holman

" \* \* \* and it is now therefore further found, determined and decreed by the Court that the defendant, the City of Holden, a municipal corporation, as aforesaid, shall receive four-sevenths (4/7) of said residue of the deceased's estate and so regardless of whether said four-sevenths (4/7) share is more or less than the amount of said defendant's devise and bequest in the amount and sum of One Hundred Thousand Dollars (\$100,000.00) as hereinbefore determined and adjudged by the Court."

The Probate Court of Johnson County, Missouri, on December 27, 1962, approved final settlement and ordered distribution in part as follows:

"The Court does further find that by virtue of an agreement entered into on April 1, 1960, by and between the City of Holden, Missouri, a municipal corporation, the school district of Kansas City, Missouri, acting on behalf of (R.J.) DeLano School, St. Luke's Hospital of Kansas City, and said executors which was embodied in the decree of the Circuit Court of Johnson County, Missouri, the said school district for and on behalf of DeLano School was to and did receive the sum of \$18,750.00; and St. Luke's Hospital, having been determined to be the 'St. Luke's Hospital' mentioned in the will, likewise received the sum of \$18,750.00; both of which sums have been paid and payment thereof is hereby approved; and the City of Holden having accepted the custody and maintenance of the 'provide a public meeting place for the public of the town' did by said agreement receive the sum of \$91,285.71, the payment of which is hereby approved, and,"

Thus, under the decrees of the Circuit Court and Probate Court there was a gift to the city of \$91,285.71; and the cancelled checks you have enclosed show that the City of Holden has received the total sum of \$91,285.71 from the estate.

We note that Holden is a third class city. Section 77.010, RSMo 1959, provides for the incorporation and powers of a third class city and reads as follows:

"Any city of the third class in this state may become a body corporate under the provisions of this chapter, in the manner provided by law, under



Honorable Haskell Holman

the name of the 'The city of \_\_\_\_\_', and by that name shall have perpetual succession, may sue and be sued, implead and be impleaded, defend and be defended in all courts of law and equity, and in all actions whatever; may receive and hold property, both real and personal, within such city, and may purchase, receive and hold real estate within or without such city for the burial of the dead; and may purchase, hold, lease, sell or otherwise dispose of any property, real or personal, it now owns or may hereafter acquire; may receive bequests, gifts and donations of all kinds of property; and may have and hold one common seal, and may break, change or alter the same at pleasure, and all courts of this state shall take judicial notice thereof."

Section 77,140, RSMo 1959, provides for public buildings and grounds and reads in part as follows:

"The council may also provide for the erection, purchase or renting of a city hall, workhouses, houses of correction, prisons, engine houses and any and all other necessary buildings for the city; and may sell, lease, abolish or otherwise dispose of the same, and may enclose, improve, regulate, purchase or sell all public parks or other public grounds belonging to the city, and may purchase and hold grounds for public parks within the city, or within three miles thereof."

Thus, the City of Holden has the power to receive the gift as declared by the Circuit Court and to use the gift for the intended purpose. It is our opinion, therefore, that such funds are subject to an audit by the State Auditor when made under the provisions of Section 29.230, supra.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

WWN:maw



LABOR ORGANIZATION:

NEGOTIATION:

PUBLIC BODY:

POLITICAL SUBDIVISION:

CITIES:

SCHOOLS AND SCHOOL DISTRICTS:

COLLECTIVE BARGAINING:

STATE:

STATE OFFICERS:

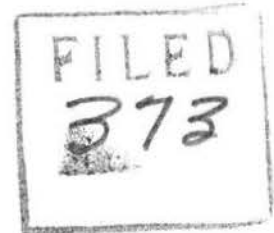
STATE BOARDS AND COMMISSIONS:

1. A city shall (used in a mandatory sense) meet with appropriate representatives of city employees when proposals relative to salaries and other conditions of employment are presented to the city. 2. When the discussions between the representatives of the city and the labor unions have been completed and the results reduced to writing, the agreement must be submitted to the governing body of the city

in the form of an ordinance, resolution, bill or other form for "adoption, modification or rejection." This procedure does not constitute "collective bargaining" in the usual understanding of such phrase because the results of the completed discussions, when reduced to writing, do not constitute a legally enforceable contract.

OPINION NO. 373

October 17, 1967



Honorable Corley Thompson, Jr.  
State Representative, 41st District  
35 Rosemont  
Webster Groves, Missouri 63119

Dear Representative Thompson:

This opinion is prepared to respond to your question wherein you requested an opinion whether House Bill 166 (as truly agreed to and finally passed by the 74th General Assembly and later signed by the Governor) requires a meeting with and entering into a "collective bargaining agreement" by a city; and, if so, whether such requirement of that law is constitutional.

The question submitted makes reference to the City of Webster Groves and has its genesis in the demands of a local labor union for negotiations and a "collective bargaining agreement" with that city.

We note that House Bill 166 does not become effective until October 13, 1967, pursuant to the terms of Section 29, Article III of the Missouri Constitution.

The four sections on labor organizations enacted in 1965 by Senate Bill 112 (Sections 105.500 through 105.530, RSMo Supp. 1965), were totally repealed and five new sections have been enacted. They are found in House Bill 166 of the 74th General Assembly and are denominated Sections 105.500, 105.510, 105.520, 105.530 and 105.540.

Honorable Corley Thompson, Jr.

Section 105.500, supra, defines certain terms in these new sections and subsection (1) thereof reads as follows:

"'Public body' means the State of Missouri, or any officer, agency, department, bureau, division, board or commission of the state, or any other political subdivision of or within the state."

Subsection (2) reads as follows:

"'Exclusive bargaining representative' means an organization which has been designated or selected by majority of employees in an appropriate unit as the representative of such employees in such unit for purposes of collective bargaining."

Quite obviously, the new act applies to Webster Groves because it is included with the meaning of "any other political subdivision of or within the state," as was held in an official opinion of this office rendered under date of May 6, 1966 to Representatives Garrett, Davis and Schapeler (#68-1966); a copy of which opinion is enclosed.

Section 105.510, provides generally that employees of a public body (with certain exceptions not applicable here) shall have the right to form or belong to labor unions; to present proposals on salaries or other conditions of employment; and, further, that no discrimination shall be applied to any employee because he is a member of the union or because he refuses to join such union.

Section 105.520, with which we are principally concerned in dealing with this problem, reads as follows:

"Whenever such proposals are presented by the exclusive bargaining representative to a public body, the public body or its designated representative or representatives shall meet, confer and discuss such proposals relative to salaries and other conditions of employment of the employees of the public body with the labor organization which is the exclusive bargaining representative of its employees in a unit appropriate. Upon the completion of discussions, the results shall be reduced to writing and be presented to the appropriate administrative, legislative or other governing body in the form of an ordinance, resolution, bill or other form required for adoption, modification or rejection." (Emphasis supplied)

Honorable Corley Thompson, Jr.

For easy reference the pertinent constitutional provisions of the Missouri Constitution are set forth hereafter. Section 29 of Article I, Missouri Constitution, reads as follows:

"Organized labor and collective bargaining.-- That employees shall have the right to organize and to bargain collectively through representatives of their own choosing." (Emphasis supplied.)

The pertinent part of Section 40, Article III, reads as follows:

"The general assembly shall not pass any local or special law:

"(27) regulating labor, trade, mining or manufacturing;"

Section 105.520 of House Bill 166, supra, provides generally that a public body or its representative "shall meet, confer and discuss" any labor proposals. This section provides further that: "Upon the completion of discussions, the results shall be reduced to writing and be presented to the . . . governing body in the form of a . . . resolution . . . required for adoption, modification or rejection." The word "shall" as used in Section 105.520 of House Bill 166 requires definition.

The Missouri Supreme Court in State v. Wymore, 119 S.W.2d 941, 944, distinguished between the terms "may" in a permissive sense, and "shall" in a mandatory sense, using the following words:

" \* \* \* On reading the article it will be noted that the words 'may' and 'shall' are used many times in the several sections. They were used advisedly and must be given their usual and ordinary meaning. It is the general rule that in statutes, the word 'may' is permissive only, and the word 'shall' is mandatory. \* \* \* "

Accordingly, the representative or representatives of a city shall (used in a mandatory sense) meet with a labor organization when it is the "exclusive bargaining representative" as defined by Section 105.500(2), supra. As Section 105.520 states, the purpose of the meeting is to confer and discuss such proposals relative to salaries and other conditions of employment of the city employees.

We must next consider whether this is "collective bargaining" as the word is generally accepted. "Collective bargaining" results

Honorable Corley Thompson, Jr.

in an accord between the employer and employee and defines a contractual relationship which will govern the many interrelated problems between the employer and the employees. See our opinion dated March 15, 1957, to the Honorable W.H.S. O'Brien. Labor relations in the public employment field are distinct and are quite different from those procedures generally found to exist in private industry. By way of illustration, we find in private industry both the employer and employees engage in a process of "collective bargaining" which results in a contractual relationship enforceable at law. The bargaining goes on between the unions representing the employees and the representatives of the employer. In public employment, the purposes of any negotiation is to bargain collectively or as a group to decide if joint recommendations arising out of the conference and discussion of the proposals can be arrived at by the representatives of the employees, and in this case, the city. See Section 29, Article I, Missouri Constitution. If so, under the very words of Section 105.520, House Bill 166, the results shall be "reduced to writing and be presented to the appropriate . . . governing body (in this case probably the council) in the form of an ordinance or resolution, bill or other form required for adoption, modification or rejection." Quite obviously, we distinguish in this opinion between the constitutional right to "bargain collectively" as a group, which we equate to the right to petition, and the process of "collective bargaining" as it is understood in private industry. This procedure as we have construed the phrase "bargain collectively" affords due process and recognition of the "separation of powers" doctrine. In public employment, the relation of employer and employee may only be altered because of changes in legislation or rules. On the contrary, in private industrial relationships, it is the contract that defines employer-employee relations and this definition of relationship of employer viz-a-viz the employees exists for the term of the contract.

We predicate our position that a municipality may not enter into a "collective bargaining agreement" upon the case of City of Springfield v. Clouse, which is reported in 206 S.W.2d 539. As we held in the enclosed opinion, No. 68, dated May 6, 1966, to the Honorable Howard M. Garrett et al., we believe this en banc opinion to be declaratory of the law under our Missouri Constitution. For this reason we quote rather extensively from this opinion underscoring pertinent portions of it for emphasis:

" \* \* \* All citizens have the right, preserved by the First Amendment to the United States Constitution and Sections 8 and 9 of Article I of the 1945 Missouri Constitution, Sections 14 and 29, Art. 2, Constitution of 1875, to peaceably assemble and organize for

Honorable Corley Thompson, Jr.

any proper purpose, to speak freely and to present their views and desires to any public officer or legislative body. Employees had these rights before Section 29, Article I, 1945 Constitution was adopted. \* \* \* Nevertheless, the organization and activity in organizations of public officers and employees is subject to some regulation for the public welfare. See United Public Workers v. Mitchell, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. \_\_; Oklahoma v. United States Civil Service Commission, 330 U.S. 127, 67 S.Ct. 544, 91 L.Ed. \_\_; King v. Priest, Mo.Sup., 206 S.W.2d 547, and cases therein cited. This is because a public officer or employee, as a condition of the terms of his public service, voluntarily gives up such part of his rights as may be essential to the public welfare or be required for the discipline of a military or police organization. (l.c. 542)

"Therefore, we start with the proposition that there is nothing improper in the organization of municipal employees into labor unions; and that no new constitutional provisions were necessary to authorize them. However, collective bargaining by public employees is an entirely different matter. \* \* \* (l.c. 542) [Emphasis supplied].

"Indeed defendants' counsel recognize (as did the sponsors of Section 29 in the Constitutional Convention) that wages and hours must be fixed by statute or ordinance and cannot be the subject of bargaining. In the argument in this case, en banc, it was conceded that a city council cannot be bound in any such bargaining; that it must provide the terms of working conditions, tenure and compensation by ordinance; and that it likewise by ordinance may change any of them the next day after they have been established. (l.c. 543)

\* \* \* \* \*

"This is confusing collective bargaining with the rights of petition, peaceable assembly and



Honorable Corley Thompson, Jr.

free speech. Certainly public employees have these rights for which Mr. Wood was contending; and can properly exercise them individually, collectively or through chosen representatives, subject, of course, to reasonable legislative regulation as to time, place and manner in the interest of efficient public service for the general welfare of all the people. However, persons are not engaging in collective bargaining when they tell their senator, representative or councilman what laws they believe they should make. Neither are they engaging in collective bargaining with executive or administrative officers when they urge them to exercise discretionary authority within standards and limits which they have received or must receive from the legislative branch, or ask them to make recommendations to the legislative branch for further legislation. (l.c. 543) [Emphasis supplied].

" \* \* \* But legislative discretion cannot be lawfully bargained away and no citizen or group of citizens have any right to a contract for any legislation or to prevent legislation. The only field in which employees have ever had established collective bargaining rights, to fix the terms of their compensation, hours and working conditions, by such collective contracts, was in private industry. (l.c. 543) [Emphasis supplied].

\* \* \* \* \*

" \* \* \* Thus the Convention did not settle the matter of public employees in labor organizations and their functions in governmental relations but left the matter to the legislature and the courts. While these debates are instructive as to the background and development of this proposal, nevertheless what was submitted to the people for adoption was Section 29 and not any delegate's speech about it. See *Adamson v. People of State of California*, 67 S.Ct. 1672, 91 L.Ed. \_\_\_, and concurring opinion of Justice Frankfurter, 67 S.Ct. loc.cit. 1682; see also *Household Finance Corporation v. Shaffner*, Mo. Sup., 203 S.W.2d 734, loc.cit. 737. Furthermore,



Honorable Corley Thompson, Jr.

the people voted on the adoption of an entire Constitution so that Section 29 must be construed in connection with all the provisions of the Constitution of which it is a part, many of which have long been essential parts of our basic law. (l.c. 544)

" \* \* \* The principle of separation of powers is stated in Article II, Art. III, 1875 Const., which provides that 'the powers of government shall be divided into three distinct departments \* \* \* each of which shall be confided to a separate magistracy'; and that 'no person, or collection of persons, charged with the exercise of powers properly belonging to one of these departments, shall exercise any power properly belonging to either of the others.' This establishes a government of laws instead of a government of men; a government in which laws authorized to be made by the legislative branch are equally binding upon all citizens including public officers and employees. The legislative power of the state is vested in the General Assembly by Section 1 of Article III. Sec. 1, Art. IV, 1875 Const. The members of the legislative branch represent all the people, and speak with the voice of all of the people, including those who are public officers and employees. In the exercise of their legislative powers, they must speak through laws which must be equally binding upon all and not through contracts. Even the making of public contracts must be authorized by law. See Sec. 39(4), Article III, 1945 Const., Sec. 48, Art. IV, 1875 Const. Laws must be made by deliberation of the lawmakers and not by bargaining with anyone outside the lawmaking body. These same governmental principles and constitutional provisions apply also to municipalities because their legislative bodies exercise part of the legislative power of the state. See *City of Springfield v. Smith*, 322 Mo. 1129, 19 S.W.2d 1; *Ex parte Lerner*, 281 Mo. 18, 218 S.W. 331 and cases cited; see also Sections 6613-6617 as to legislative powers of the city council of second class cities. The City's organization and powers come from the General Assembly which is authorized by Section 15, Article VI, Sec. 7, Art. IX, 1875 Const. to provide for the organization and classification of cities and towns with the limitation that 'the number of such classes shall

Honorable Corley Thompson, Jr.

not exceed four; and the powers of each class shall be defined by general laws so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions.' It is inconceivable that the Constitutional Convention intended to invalidate all of the statutes, enacted through the years under this authority, concerning the operation of municipalities in fixing and regulating compensation, tenure, working conditions and other matters concerning public officers and employees. (l.c. 544-545)

"Under our form of government, public office or employment never has been and cannot become a matter of bargaining and contract. State ex rel. Rothrum v. Darby, 345 Mo. 1002, 137 S.W.2d 532; see also Nutter v. City of Santa Monica, 74 Cal.App.2d 292, 168 P.2d 741, loc.cit. 745; Miami Water Works Local No. 654 v. City of Miami, 157 Fla. 445, 26 So.2d 194, loc.cit. 197, 165 A.L.R. 967; Mugford v. Mayor and City Council of Baltimore, 185 Md. 266, 44 A.2d 745, loc.cit. 747, 162 A.L.R. 1101. This is true because the whole matter of qualifications, tenure, compensation and working conditions for any public service, involves the exercise of legislative powers. Except to the extent that all the people have themselves settled any of these matters by writing them into the Constitution, they must be determined by their chosen representatives who constitute the legislative body. It is a familiar principal of constitutional law that the legislature cannot delegate its legislative powers and any attempted delegation thereof is void. 11 Am.Jur. 921, Sec. 214; 16 C.J.S. Constitutional Law, §133; A.L.A. Schechter Poultry Corporation v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947. If such powers cannot be delegated, they surely cannot be bargained or contracted away; and certainly not by any administrative or executive officers who cannot have any legislative powers. Although executive and administrative officers may be vested with a certain amount of discretion and may be authorized to act or make regulations in accordance with certain fixed standards, nevertheless the matter of making such standards involves the exercise of legislative powers. Thus qualifications, tenure, compensation and working conditions of

Honorable Corley Thompson, Jr.

public officers and employees are wholly matters of lawmaking and cannot be the subject of bargaining or contract. Such bargaining could only be usurpation of legislative powers by executive officers; and, of course, no legislature could bind itself or its successor to make or continue any legislative act. \* \* \* (l.c. 545) [Emphasis supplied.]

" \* \* \* The question involved herein is a question of power rather than one of what function is involved. 'Missouri cities have or can exercise only such powers as are conferred by express or implied provisions of law; their charters being a grant and not a limitation of power, subject to strict construction, with doubtful powers resolved against the city.' Taylor v. Dimmit, 336 Mo. 330, 78 S.W.2d 841, 843, 98 A.L.R. 995. Fixing compensation, hours and tenure require the exercise of legislative powers in exactly the same way for all employees of the City, whether governmental or corporate, at least under the organization of second class cities in this state. \* \* \* " (l.c. 546) [Emphasis supplied.]

In view of the interpretation by the Missouri Supreme Court in the Clouse case, the General Assembly is presumed to be aware of that declaration of law by the Supreme Court when it adopts laws on the same subject (Mack Motor Truck Corporation v. Wolfe, 303 S.W.2d 697, 700; Jacoby v. Missouri Valley Drainage District, 163 S.W.2d 930, 939). We must therefore conclude that the General Assembly had in mind an intent to enact legislation in accord with the constitutional principles enunciated in the Clouse case.

The Clouse case defines and sets forth the constitutional framework within which area the legislature may construct legislation authorizing public bodies to deal with labor problems. Outside of that framework as defined in the Clouse case, the legislature may not properly act.

Accordingly, we again hold that a city may not engage in collective bargaining as the term is generally understood and accepted.

Honorable Corley Thompson, Jr.

An additional comment is appropriate in that Section 105.520, House Bill 166, holds that discussions between the city and the bargaining representative when completed, are reduced to writing and presented to the appropriate governing body in the form required for adoption, modification or rejection. An interpretation of this phrase might be appropriate for your guidance. In commenting upon this, we recognize that the basic rule for the interpretation of any statute is to seek the lawmakers intention for the whole act. Words should be given their plain ordinary meaning to promote the object and purpose of the statute (Julian v. Mayor, 319 S.W.2d 864; State v. Weinstein, 395 S.W.2d 525). These words, "adoption, modification or rejection," as used in the statute, impose upon the governing body discretion whether to accept, modify, reject in part or reject en toto the proposals submitted which were agreed to and reduced to written proposals by the representatives of both the city and the union.

#### CONCLUSION

It is the opinion of this office that:

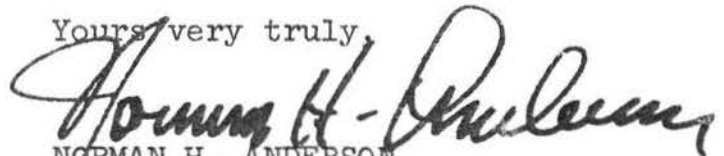
1. A city shall (used in a mandatory sense) meet with appropriate representatives of city employees when proposals relative to salaries and other conditions of employment are presented to the city.

2. When the discussions between the representatives of the city and the labor unions have been completed and the results reduced to writing, the agreement must be submitted to the governing body of the city in the form of an ordinance, resolution, bill or other form for "adoption, modification or rejection."

This procedure does not constitute "collective bargaining" in the usual understanding of such phrase because the results of the completed discussions, when reduced to writing, do not constitute a legally enforceable contract.

The foregoing opinion, which I hereby approve, was prepared by my assistant Richard C. Ashby.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

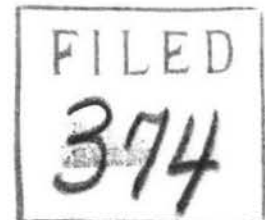
Enclosures: Opinion No. 68,  
to Garrett, Davis  
and Schapeler,  
5-6-66; and  
Opinion to W.H.S. O'Brien,  
3-15-57.

SHERIFFS:  
OFFICERS:  
COUNTY OFFICERS:  
COMPENSATION:  
FEES:  
ACCOUNTABLE FEES:

Sheriffs entitled to compensation provided in Senate Bill 237 of the Seventy-fourth General Assembly during the present term of office; must pay all criminal fees into county treasury; mileage for serving criminal warrants and criminal investigation and payment for person's meals are "reimbursable expenses"; salary provisions of Sections 57.390, 57.400, 57.403, 57.405 and Senate Bill 237 are "remunerations" within meaning of Senate Bill 237.

OPINION NO. 374

October 17, 1967



Honorable Haskell Holman  
State Auditor  
State of Missouri  
Capitol Building  
Jefferson City, Missouri

Dear Mr. Holman:

This is in answer to your request for an opinion asking a number of questions concerning Senate Bill 237 enacted by the Seventy-fourth General Assembly.

The first question reads as follows:

"1. Are sheriffs of third and fourth class counties entitled to receive, on and after October 13, 1967, the additional compensation provided for in paragraph 2 Section 1 and paragraph 2 Section 2, respectively, Senate Bill 237 Seventy-Fourth General Assembly or does the provision of Section 13, Article VII of the Constitution prohibit said increase during the present term of such officers?"

Senate Bill No. 237 reads in part as follows:

"Section 1. 1. Sheriffs in counties of the third class shall, in addition to other duties imposed upon them by law, aid and assist the jury commissioners in such counties by conducting all investigations into the identity, of all prospective jurors summoned for jury duty



Honorable Haskell Holman

by such jury commissioners, and upon request of the board of jury commissioners, make and file a report with such board setting out the results of such investigation.

2. In addition to the salary, travel expenses, reimbursement expenses, and any other compensation now provided by law, the sheriffs in each county of the third class, for the performance of the foregoing duties, shall receive the sum of two thousand five hundred dollars per year, payable in twelve equal monthly installments out of the county treasury, by warrants drawn by the county court upon the county treasury.

Section 2. 1. Sheriffs in counties of the fourth class shall, in addition to other duties imposed upon them by law, aid and assist the jury commissioners in such counties by conducting all investigations into the identity, of all prospective jurors summoned for jury duty by the jury commissioners, and upon request of the board of jury commissioners, make and file a report with such board setting out the results of the investigation.

2. In addition to the salary, travel expenses, reimbursement expenses, and any other compensation now provided by law, the sheriffs in each of the fourth class, for the performance of the foregoing duties, shall receive the sum of two thousand dollars per year, payable in twelve equal monthly installments out of the county treasury, by warrants drawn by the county court upon the county treasury."

Section 13 of Article VII of the Missouri Constitution reads as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any office be extended."

This constitutional provision applies to sheriffs. State ex rel Selleck v. Gordon, 254 Mo. 471, 162 S.W. 629.

The Supreme Court of Missouri in Little River Drainage District v. Lassater, 325 Mo. 493, 29 S.W.2d 716, 719, said the following:



Honorable Haskell Holman

"[6] The constitutional inhibition only applies to compensation or fees of officers for performing duties incident to their offices, and has no application to additional duties imposed upon such officers not ordinarily incident to their offices."

The question therefore is whether Senate Bill 237 imposes additional duties on sheriffs of third and fourth counties not ordinarily incident to their office.

There are presently a number of statutes imposing certain duties on sheriffs in relation to juries. Chapter 494, RSMo, contains general provisions as to juries. Section 1 of Section 494.250, RSMo 1959, provides for the selection of jurors by the board of jury commissioners. Subsection 2 reads as follows:

"2. In all cases where the board of jury commissioners fails to select jurors and alternates, as required by law, the sheriff of the county shall summon petit jurors from the several townships in the county, according to their respective populations, as nearly as may be, not less than ten days before the first day of the term of court for which the jurors are summoned; and the sheriff when ordered by the court demanding a jury shall summon petit jurors during the term from the bystanders, after the list of alternate petit jurors has been exhausted. No person shall be summoned as a standing juror twice within the period of one year in any court of record."

Section 494.260, RSMo 1959, provides for the filling of vacancies when a juror is disqualified and also imposes a duty on the sheriff. This section reads in part as follows:

"\* \* \* the Court shall order the sheriff to summon from the list of alternate petit jurors drawn by the board of jury commissioners a sufficient number of persons to serve as jurors for such term or part of term of said court as follows: \* \* \*; provided, that if it shall be necessary to fill vacancies in the jury panel for the trial of any one case the court may in its discretion order the sheriff to summon from the bystanders a sufficient number of qualified persons to fill such vacancies in such case."

Section 494.280, RSMo 1959, provides for the recording and certification of the list of jurors and also for the issuance of a

Honorable Haskell Holman

summons for jury duty. The sheriff has the duty of serving the summons.

Sections 57.280 and 57.290, RSMo 1959, provide for fees for sheriffs. Included are fees for summoning a jury.

It is our opinion that neither the above cited statutes nor any others impose the duties prescribed by Senate Bill 237. Therefore, the duties imposed by Senate Bill 237 are additional duties and are not subject to Section 13 of Article VII of the Constitution of Missouri.

The second question reads as follows:

"2. Are all fees received by the sheriff in third and fourth class counties for duties performed in connection with criminal services of every nature deemed accountable fees and to be reported and paid to the county treasurer each month as required by Section 50.370, RSMo., 1959?"

The applicable parts of Senate Bill 237 relating to this question are subsections 3 and 4 of Section 2 and read as follows:

"3. Any other provision of law notwithstanding, the sheriffs in each county of the third class shall retain only that portion of fees other than reimbursable expenses allowed to him by law which, together with all other remuneration provided by law, shall not exceed the sum of twelve thousand five hundred dollars. The balance of such fees shall be paid into the county treasury.

4. Any other provision of law notwithstanding, the sheriffs in each county of the fourth class shall retain only that portion of fees other than reimbursable expenses allowed to him by law which, together with all other remuneration provided by law, shall not exceed the sum of ten thousand dollars. The balance of such fees shall be paid into the county treasury."

Section 13 of Article VI of the Constitution of Missouri reads as follows:

"All state and county officers, except constables and justices of the peace, charged with the investigation, arrest, prosecution, custody, care, feeding, commitment, or transportation of persons accused of or convicted of a criminal offense

Honorable Haskell Holman

shall be compensated for their official services only by salaries, and any fees and charges collected by any such officers in such cases shall be paid into the general revenue fund entitled to receive the same, as provided by law. Any fees earned by any such officers in civil matters may be retained by them as provided by law."

Section 57.410, RSMo 1959, reads as follows:

"In all counties of the third and fourth classes, the sheriff shall charge and collect for and on behalf of the county every fee accruing to his office which arises out of his duties in connection with the investigation, arrest, prosecution, care, commitment, and transportation of persons accused of or convicted of a criminal offense, except such criminal fees as are chargeable to the county. The sheriff may retain all fees collected by him in civil matters."

Section 50.370, RSMo 1959, provides that every officer of a third and fourth class county who receives fees which are payable to the county must file a report with the county court and pay over all such fees to the county treasurer.

Thus, it is clearly required by the constitution and by statute that sheriffs must pay fees collected for criminal services to the county. The question is whether subsections 3 and 4 of Section 2 of Senate Bill 237 provide that sheriffs of third and fourth class counties may retain all or a portion of criminal fees.

The first rule in statutory construction is to determine the intent of the legislature and to apply to an act its plain and rational meaning. *State ex rel LeNeve v. Moore, Mo.*, 408 S.W.2d 47. A statute must be construed, if possible, so as to give it force and effect and render it operative. *State ex rel Clay Equipment Corp. v. Jensen, Mo.*, 363 S.W.2d 666. New legislation must be construed and applied consistently with the construction placed upon the related parts of the general law. *In re Dugan's Estate, Mo.App.*, 309 S.W.2d 137.

With these rules in mind it is our opinion that subsections 3 and 4 of Section 2 of Senate Bill 237 do not provide that sheriffs of third and fourth class counties may retain all or a portion of criminal fees. It is our opinion that the legislature intended that sheriffs of third and fourth class counties may retain a portion of the fees that they are otherwise authorized to retain and that these new sections merely put a limit on the total amount.

Honorable Haskell Holman

The third question is whether the expenses provided for in Sections 221.090, RSMo 1959, and 57.430, RSMo Supp. 1965, are "reimbursable expenses" as referred to in subsection 3 and 4 of Section 2 of Senate Bill 237.

Subsection 1 of Section 221.090, supra, directs the sheriff of third and fourth class counties to feed prisoners in the county jail. This section reads in part as follows:

"1. In each county of the third or fourth class, the sheriff shall furnish wholesome food to each prisoner confined in the county jail. At the end of each month, he shall submit to the county court a statement supported by his affidavit, of the actual cost incurred by him in the boarding of prisoners, together with the names of the prisoners, and the number of days each spent in jail. The county court shall audit the statement and draw a warrant on the county treasury payable to the sheriff for the actual and necessary cost."

Enclosed are Attorney General Opinions No. 45, dated March 10, 1952, issued to the Honorable D. R. Jennings, and No. 322, dated October 12, 1964, issued to the Honorable Alden S. Lance, which discuss Section 221.090, supra. The substance of these opinions is that a sheriff of a third and fourth class county must furnish food to prisoners in the county jail and are then entitled to reimbursement for the actual cost of such food. It is our opinion that such payments to a sheriff by the County under Section 221.090, supra, are "reimbursable expenses" as referred to in subsections 3 and 4 of Section 2 of Senate Bill 237.

Section 57.430, supra, provides for actual and necessary expenses for sheriffs when serving warrants or other criminal process and also expenses in connection with criminal investigation. This section reads in part as follows:

"In addition to the salary provided in sections 57.390 and 57.400, the county court shall allow the sheriffs and their deputies, payable at the end of each month out of the county treasury, actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed ten cents per mile, and actual expenses not to exceed ten cents per mile for each mile traveled, the maximum amount allowable to be two hundred dollars during any one calendar month in the performance of their official duties in connection with the investigation of persons accused of or convicted of a criminal offense. When mileage is allowed,

Honorable Haskell Holman

it shall be computed from the place where court is usually held, and when court is usually held at one or more places, such mileage shall be computed from the place from which the sheriff or deputy sheriff travels in performing any service. When two or more persons who are summoned, subpoenaed, or served with any process, writ, or notice, in the same action, live in the same general direction, mileage shall be allowed only for summoning, subpoenaing or serving of the most remote."

The same principles as applied to Section 221.090, supra, apply here where the language of the statute is explicit that mileage shall be paid only for actual expenses. Therefore, it is our opinion that payments to a sheriff for mileage expenses allowed under Section 57.430, supra, are "reimbursable expenses" as referred to in subsections 3 and 4 of Section 2 of Senate Bill 237.

The fourth question is whether compensation under certain statutes are included as "remuneration" as referred to in subsection 3 and 4 of Section 2 of Senate Bill 237.

The statutory compensations you have referred to concerning third class counties are Sections 57.390, 57.403, and 57.405, RSMo 1959, and subsection 2 of Section 1 of Senate Bill 237. The statutory compensations you have referred to concerning fourth class counties are Sections 57.400, 57.403 and 57.405, RSMo 1959, and subsection 2 of Section 2 of Senate Bill 237.

Section 57.390, supra, provides compensation of varying amounts for sheriffs of third class counties depending on the population of the county. The compensation is for the performance of certain duties as follows:

"The sheriff in Counties of the third class shall receive annually for his official services in connection with the investigation, arrest, prosecution, custody, care, feeding, commitment and transportation of persons accused of or convicted of a criminal offense, the following sums: \* \* \*"

Section 57.400, supra, is comparable to Section 57.390, supra, and also provides compensation of varying amounts for the performance of official services in connection with the criminal statutes. The difference is the amounts and that they are for sheriffs of fourth class counties.

Subsection 1 of Section 57.403, supra, provides for a yearly salary of one thousand dollars for sheriffs of third class counties and subsection 2 provides for a yearly salary of five hundred dollars for sheriffs of fourth class counties for the performance of the



Honorable Haskell Holman

duties required by Section 57.105, RSMo 1959. Section 57.105, supra, imposes a duty on sheriffs of third and fourth class counties to take pictures of and fingerprint persons accused of or convicted of a criminal offense when the person is in the custody of the sheriff.

Subsection 1 of Section 57.405, supra, provides for yearly compensation in addition to that provided by Section 57.390, supra, for sheriffs of third class counties and subsection 2 provides for yearly compensation in addition to that provided by Section 57.400, supra, for sheriffs of fourth class counties. This section was enacted in 1953 and amended in 1957 and is merely a pay raise for the performance of the duties required by Sections 57.390 and 57.400, supra.

Subsection 2 of Section 1 and subsection 2 of Section 2 of Senate Bill 237 provide for compensation for sheriffs of third and fourth class counties for the performance of additional duties imposed by subsection 1 of Section 1 and subsection 1 of Section 2 of Senate Bill 237. These provisions are quoted and discussed in question one of this opinion.

It is our opinion that all the above compensations referred to are included as "remuneration" as referred to in subsections 3 and 4 of Section 2 of Senate Bill 237. These compensations should then be totaled to determine the amount of fees that may be retained to equal the sum of twelve thousand five hundred dollars for sheriffs of third class counties and ten thousand dollars for sheriffs of fourth class counties. We have already held in question two of this opinion that fees for criminal services are not such fees that may be retained. It is our opinion that these fees allowed to sheriffs by law and which may be retained up to a certain amount are non-accountable fees received for services in civil matters.

#### CONCLUSION

1. It is the opinion of this office that the duties imposed by Senate Bill 237 enacted by the Seventy-fourth General Assembly are additional duties and these are not subject to Section 13 of Article VII of the Constitution of Missouri. Therefore, sheriffs of third and fourth class counties are entitled to receive on and after October 13, 1967, the additional compensation provided for in paragraph 2 of Section 1 and paragraph 2 of Section 2 of Senate Bill 237.

2. Subsections 3 and 4 of Section 2 of Senate Bill 237 do not provide that sheriffs of third and fourth class counties may retain all or a portion of criminal fees and that such fees are accountable and must be reported and paid to the county treasurer as required by Section 50.370, RSMo 1959.



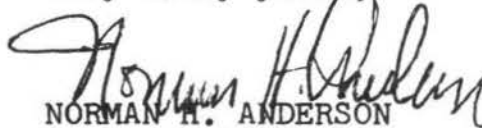
Honorable Haskell Holman

3. The expenses provided for in Sections 221.090, RSMo 1959, and 57.430, RSMo Supp. 1965, are "reimbursable expenses" as referred to in subsections 3 and 4 of Section 2 of Senate Bill 237.

4. The compensations provided for in Sections 57.390, 57.400, 57.403 and 57.405, RSMo 1959, and subsection 2 of Section 1 and subsection 2 of Section 2 of Senate Bill 237, are included as "remuneration" as referred to in subsections 3 and 4 of Section 2 of Senate Bill 237.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General

Enclosures: Opinion No. 45  
3/10/52 - Jennings  
Opinion No. 322  
10/12/64 - Lance

ELECTIONS:  
NONPARTISAN COURT PLAN:  
PETITIONS:  
ELECTION PETITIONS:

Petition for adoption of nonpartisan court plan in 21st judicial circuit, August 6, 1968, follows form set out in Section 1, House Bill No. 27 of the 74th General Assembly and is sufficient.

OPINION NO. 377

October 3, 1967



Honorable Kenneth J. Rothman  
State Representative - 38th District  
Missouri House of Representatives  
6815 Plymouth Avenue  
University City, Missouri 63130

Dear Representative Rothman:

This is in answer to your letter of recent date concerning House Bill No. 27 of the 74th General Assembly with which letter you enclose a petition asking that the question of the adoption of the non-partisan court plan be voted on by the voters of the 21st Judicial Circuit at the Primary Election to be held August 6, 1968, together with two proposed Addendums to such petition.

The petition and the proposed addendums read as follows:

"TO THE HONORABLE OFFICIALS IN general charge of elections for the County of St. Louis for the State of Missouri:

We, the undersigned, legal voters of the State of Missouri and of the County of St. Louis, respectfully demand that the question of the adoption of the non-partisan selection of the Circuit and Probate Judges be submitted to the legal voters of the Twenty-First Judicial Circuit, for their approval or rejection, at the general primary election to be held on the 6th day of August, A.D. 1968.

Name

Adress

It is understood by the undersigned legal voters of the State of Missouri and of the County of St. Louis, that this petition may be submitted to the officials in general charge of elections for the County of St. Louis for the State of Missouri in multiple counterparts which may be signed by different and varying numbers of petitioners and that all such counterparts so signed and so submitted shall be taken and considered collectively and as one petition.

STATE OF MISSOURI }  
COUNTY OF ST. LOUIS } SS.

I, \_\_\_\_\_, residing at \_\_\_\_\_, St. Louis County, Missouri, state upon my oath that the signatures on this page of the above and foregoing petition were affixed in my presence.

Subscribed and sworn to before me, a Notary Public,  
within and for the County of St. Louis, Missouri, on  
the                      day of                      , 1967.

1

"A. Is the Petition by and of itself sufficient under the law?"

Section 1. Upon the filing with the officials in general charge of elections in each county of the first class having a charter form of government in any judicial circuit not having the nonpartisan selection of judges as provided for in article V, section 29(b) of the constitution of 1945 of a petition praying that the nonpartisan selection of judges be adopted for the circuit court and probate court in such judicial circuit signed by the legal voters in such number as shall equal five per cent of the total vote

cast in each county in said judicial circuit at the last general election for governor, the officials in general charge of elections in each such county shall determine the legal sufficiency thereof and certify the same to the secretary of state.

"Section 2. The petition shall be in substantially the following form:

To the Honorable Officials in general charge of elections for the county of . . . . .  
for the state of Missouri:

We, the undersigned, legal voters of the state of Missouri and of the county of . . . . ., respectfully demand that the question of the adoption of the nonpartisan selection of the circuit and probate judges be submitted to the legal voters of the . . . . . judicial circuit, for their approval or rejection, at the general primary election to be held on the . . . . . day of . . . . ., A.D. 19.."

In answer to your first question, it is our view that the petition which you enclosed and which follows the form provided for in Section 2 in House Bill No. 27 of the 74th General Assembly is sufficient under the provisions of such Bill to authorize a vote on the adoption of a nonpartisan court plan by the voters of the 21st Judicial Circuit. Such Bill makes no further requirements concerning the petition and it is our view that such petition if signed by the requisite number of voters would authorize the submission of such question to the voters at the August 1968, Primary Election.

Your second question reads as follows:

"B. Would the Petition be sufficient by and of itself and Addendum No. 1?"

We believe that the petition alone is sufficient without the proposed first Addendum. However it might be held by the courts of this State, that House Bill No. 27 and Chapter 126, RSMo, relating to initiative and referendum generally are in pari materia and must be construed together. If House Bill No. 27 and Chapter 126 of the RSMo are considered together, the provisions of Section 126.030, RSMo, would be applicable to the petition filed under House Bill No. 27 and since such Section provides that petitions for any law or amendment to the Constitution of Missouri proposed by the initiative may be filed in several sheets or sections, provided every sheet contains a copy of the title and text of the measure proposed such Section would authorize the submission of the petition on several sheets each of which contains the statutory form and make unnecessary the inclusion of Addendum.

Further, the general rule is that petitions required under election laws may be submitted in several sheets or sections as long as each sheet contains the petition form required by statute. This rule is succinctly set out in the case of *Jordan v. Overstreet*, 352 S.W.2d 296 in which case the Court of Civil Appeals of Texas at Beaumont held l.c. 299,300:

"As a basis for the order calling the election by the county judge there was submitted to him three different sheets of paper at the top of each of which there appears identical language addressed to the County Judge of Hardin County, Texas, requesting him to call an election in the two districts for the purpose of determining whether they should be consolidated for school purposes. Each of these pages was dated November 19, 1960, and bore the signatures of different qualified voters of the Batson district, and no one page contained as many as 20 signatures. The three pages were fastened together and submitted to the County Judges as 'the petition' as a basis for calling the election. Appellant's 6th point contends that since Article 2806, V.A.T.S., provides that on 'the petition' of 20 or a majority of the legally qualified voters of each district the county judge shall call such election and since no one of the pages or sheets had the requisite number of signatures, the election was improperly called. To sustain this point we would give precedence to form over substance. We decline to do this. *Sanders v. Mason*, 197 Ga. 522, 29 S.E.2d 780; 18 Am.Jur. 244."

However, including Addendum 1 on each sheet of the petition in addition to the statutory petition form could not in any way affect the validity of such petition and might preclude an attack on such petition on such point.

Your third question reads as follows:

"C. Would the Petition be sufficient in and of itself or in addition to Addendum No. 1 and No. 2 or just Addendum No.2?"

As stated above, it is our view that the statutory form of the petition is all that is required by House Bill No. 27. The reason for proposed Addendum 2, apparently would be to provide a sworn statement of the authenticity of the signatures on the petition.

We are informed by the Secretary of the St. Louis County Election Board that each signature on all petitions submitted to the Election Board is compared with the signature of the person



allegedly signing the petition found on the registration records of the County. This would appear to be the most certain and effective way possible to determine whether the petition actually is signed by the requisite number of voters. However, if it were held that House Bill No. 27 and Chapter 126 RSMo, are in pari materia and must be construed together, the provisions of Section 126.040, RSMo would be applicable, and the form provided in such Section for the affidavit of the circulators of the petition would be applicable. Of course, such statute provides that the statutory form is not mandatory but it is sufficient if the statutory form is substantially followed.

The addition of Addendum 2, or the addition of the form set out in Section 126.040 to the petition could not in any way affect the validity of such petition and it might preclude an attack on the petition on such point.

Under the provisions of Section 1 of House Bill No. 27, the officials in general charge of elections in St. Louis County which County contains the 21st Judicial Circuit shall determine the legal sufficiency of the petition and certify the same to the Secretary of State.

#### CONCLUSION

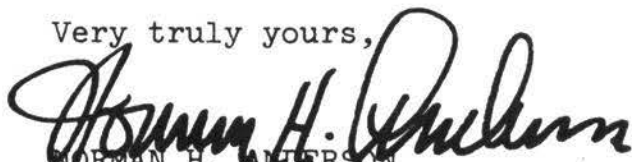
The petition form submitted to the Attorney General which follows the statutory form set out in Section 2, of House Bill No. 27, of the 74th General Assembly is sufficient to authorize a vote on the adoption of the nonpartisan court plan by the voters of the 21st Judicial Circuit at the Primary Election, August 6, 1968, if the requisite number of voters sign such petition.

The addition to each sheet of such petition of a provision that the petition may be submitted in several sheets containing such petition and that the signers of the petition understand such fact, could not affect the validity of such petition.

The addition of an affidavit on each sheet of the petition by the circulators of such petition either in the form set out in Section 126.040 RSMo, or in a form substantially following the form set out in such Section, could not affect the validity of such petition.

This opinion which I hereby approve was prepared by my assistant Mr. C. B. Burns, Jr.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General



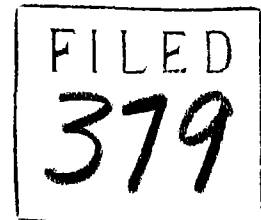
COUNTIES:  
COUNTY COURTHOUSE:  
MUNICIPALITIES:

(1) The county courts have no power or authority to provide offices in the courthouse for members of the state legislature, and (2) Cities incorporated under statutes of this state have no power or authority to provide offices for the members of the state legislature.

November 9, 1967

OPINION NO. 379

Honorable George W. Parker  
State Representative  
District 120, Boone County  
507 E. Rollins  
Columbia, Missouri 65201



Dear Representative Parker:

This is in reply to your request for an opinion on the question whether members of the legislature may be provided office space in the county courthouse. You also ask whether the same answer would apply to city local government.

Your first question is addressed to the power of the county court, for if the county can act at all in this matter, it must do so through the county court. The county court has only limited powers. See Dumm v. Cole County, 315 Mo. 568, 287 S.W. 445; King v. Maries County, 297 Mo. 488, 249 S.W. 418. In the latter case, the Supreme Court of Missouri said:

"It has been held uniformly that county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. They have only such authority as is expressly granted them by statute. \* \* \* This is qualified by the rule that the express grant of power carries with it such implied powers as are necessary to carry out or make effectual the purposes of the authority expressly granted."

Again, in Butler v. Sullivan County, 18 S. W. 1142, the court stated:

Honorable George W. Parker

"\* \* \* If the county court had such power it must be because some statute conferred it; for we have repeatedly ruled that such courts are not the general agents of the counties or the state, and only have such authority as is expressly granted them by statute; beyond the limits of such grant their acts are void. \* \* \*"

Section 49.305, RSMo 1959, provides in part as follows:

"The county court of any county may acquire by purchase, for the county, improved or unimproved real estate for a site for a courthouse, jail or poorhouse or infirmary; or when the county owns the site may acquire by purchase improved or unimproved real estate as an addition to or enlargement of the site \* \* \*".

Section 49.510, RSMo 1959, provides as follows:

"It shall be the duty of the county to provide offices or space where the officers of the county may properly carry on and perform the duties and functions of their respective offices. Said county shall maintain, furnish and equip said offices and provide them with the necessary stationery, supplies, equipment, appliances and furniture, all to be taken care of and paid out of the county treasury of said county at the time and in the manner that the county court may direct."

Section 49.270, RSMo 1959, provides in part as follows:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; \* \* \*"

Honorable George W. Parker

None of the foregoing statutory provisions contain any express authority to the county court to provide the members of the legislature the use of offices in the courthouse. Section 49.270, which grants authority to the county court to lease property, limits such authority to a lease which is made "for the use and benefit of the county" and in any event the authority so granted must come within the scope of the specific powers provided for in the statute.

Absent express authority conferred by statute, there is no power to provide members of the legislature with offices in the courthouse unless such power could be implied from the powers expressly granted. The law, as to implication of power, is stated in Everett v. County of Clinton, 282 S. W. 2d 30, 1.c. 37, as follows:

"\* \* \*If such power exists, it must be looked for among those powers which can be implied only as being essential to effectuate the purpose manifested in an express power or duty, conferred, or imposed upon the county by statute. If such a power exists, it must be one related to the subject with which the county has authority to deal in discharging a duty imposed by law. \* \* \* "

This principle was stated in Blades v. Hawkins, 133 Mo. App. 328, 112 S. W. 979, 1.c. 981, as follows:

"\* \* \*Hence, if this authority existed in the present instance, it was because the law implied it as essential to the due exercise of powers specifically vested in the courts by statute or the performance of a duty specifically required of said tribunals. The courts are conservative in implying powers not expressly given. One limitation imposed by law on these implications is that no power will be implied to belong to a public corporation unless it is cognate to the purpose for which the corporation was created. \* \* \* "

In the cases in which the county court was held to have implied power it clearly appeared that such power was essential to the proper exercise of the express power granted or was necessary to be inferred from the granting of such power. Thus, in Walker v. Linn County, 72 Mo. 650, it was held that the

Honorable George W. Parker

county court, which had the control and management of the county property and the power to alter, repair, or build county buildings, had the duty to take such measures as should be deemed necessary to preserve all buildings and property of the county and that duty carried with it the power to enter into a contract to insure the buildings.

In Ewing v. Vernon County, 216 Mo. 681, 116 S.W. 518, the court held that the county court was required to furnish necessary janitorial services for the office of the county recorder, such services being in the furtherance of the public interest. In Shiedley v. Lynch, 95 Mo. 487, 8 S. W. 434, the court held that the power to erect a courthouse included the power to buy land for a courthouse site. And in State ex rel Wahl v. Speer, 284 Mo. 45, 223 S.W. 655, 1.c. 660, the court held that the statute which empowered a county to incur a debt to build a courthouse impliedly granted power to expend part of the money in the purchase of additional ground for a site, ground to enlarge the old site and render it suitable for the proposed building.

In all of the foregoing and numerous other cases the court makes clear that the power which is implied is within the scope of the express powers or essential for the purpose of carrying out such express powers.

Your question then, is whether it may reasonably be held to be for the "use and benefit of the county" in carrying out the powers expressly granted, for the county court to provide offices in the courthouse for the exclusive benefit of members of the legislature who choose to utilize these facilities as a place where constituents could have easy access to the legislators.

Although legislators may be elected from a single county or subdivision thereof, their official rank arises from the fact that the legislature is, under our constitution, a coordinate branch of the state government. Certainly their duties concern the state at large, for the legislature is an instrumentality appointed by the state to exercise a part of its sovereign power. In this connection, Section 23.110 RSMo 1959, authorizes offices to be reserved on the third and fourth floors of the State Capitol Building for exclusive use of the members of the House of Representatives.

Honorable George W. Parker

If the county could be held to have the power to provide offices in the courthouse for members of the legislature it should follow that the county could rent space in a private building for the use of these officials, or could provide funds for the purpose of paying charges incurred by the officials for the maintenance of their own offices. This would seem to be particularly true if no office space is available in the courthouse. We do not believe that the county court has such power.

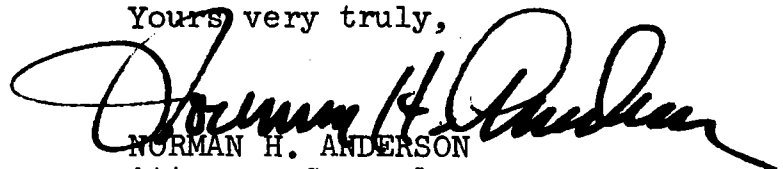
Essentially, the same reasoning would apply to city level government referred to in your second question. The courts have held that a municipal corporation is a creature of the state and can exercise only such powers as has been specifically conferred on it by charter or general law, and either in express terms or by reasonable implication. There is no statute which expressly confers these powers on the governing body of cities generally. The charters of the cities having constitutional charters should be examined to determine whether any such authority has purportedly been granted to any of such cities.

#### CONCLUSION

It is the opinion of this office that (1) the county courts have no power or authority to provide offices in the courthouse for members of the state legislature, and (2) cities incorporated under statutes of this state have no power or authority to provide offices for the members of the state legislature.

This opinion, which I hereby approve, was prepared by my Assistant L. J. Gardner.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

ASSESSMENT:  
COUNTY COLLECTOR:  
MOTOR VEHICLES:  
PERSONAL PROPERTY TAX:  
STATE TAX COMMISSION:  
TAXATION:

The State Tax Commission has no authority to equalize only a portion of any class of property established by Section 138.390, RSMo. Its report and order purporting to decrease the valuation of "Motor vehicles, trucks, airplanes, motorcycles" in St. Louis City by 50 per cent in effect subdivides the statutory class for "other tangible personal property" and establishes a new class. It is the opinion of this office that the report and order is beyond the power of the Commission and therefore, is void and without effect.

OPINION NO. 387

September 14, 1967

Honorable Paul J. Simon  
State Representative  
55th District  
2756 A Lafayette  
St. Louis, Missouri 63104



Dear Representative Simon:

This is in answer to your request for an official opinion of this office respecting the validity of a report issued by the Missouri State Tax Commission on July 12, 1967, ordering the Assessor of the City of St. Louis to decrease the valuation of "Motor vehicles, trucks, airplanes, motorcycles" within the City by 50% to \$82,261,895.

The constitutional provision creating the Missouri State Tax Commission gives it two basic duties; "to equalize assessments as between counties" and "to hear appeals from local boards in individual cases and, upon such appeal, to correct any assessment which is shown to be unlawful, unfair, arbitrary or capricious." Article X, Section 14, Constitution of Missouri 1945.

The first of these duties gives the Commission original jurisdiction to adjust the valuation of property within a county so that such property is valued equally with like property in other counties. The second gives the Commission appellate jurisdiction to correct wrongful valuation of individual pieces of property upon appeal through the county boards of equalization.

The Commission's duty "to equalize assessments as between counties" is implemented by Section 138.390, RSMo, which provides:

"1. Between the dates of June twentieth and the second Monday in July, 1946, and between the same dates each year thereafter, the state tax



Honorable Paul J. Simon

commission shall equalize the valuation of real and tangible personal property among the several counties in the state in the following manner: With the abstracts of all the taxable property in the several counties of the state and the abstracts of the sales of real estate in such counties as returned by the respective county clerks and the assessor of the city of St. Louis, the commission shall classify all real estate situate in cities, towns, and villages, as town lots and all other real estate as farming lands, and shall classify all tangible personal property as follows: Banking corporations, railroad corporations, street railroad corporations, all other corporations, horses, mares and geldings, mules, asses, and jennets, neat cattle, sheep, swine, goats, domesticated small animals and all other livestock, poultry, power machinery, farm implements, other tangible personal property.

2. The commission shall equalize the valuation of each class thereof among the respective counties of the state in the following manner:

(1) It shall add to the valuation of each class of the property, real or tangible personal, of each county which it believes to be valued below its real value in money such per cent as will increase the same in each case to its true value;

(2) It shall deduct from the valuation of each class of the property, real or tangible personal, of each county which it believes to be valued above its real value in money such per cent as will reduce the same in each case to its true value."

Paragraph 2 of Section 138.400, RSMo, provides that "This report shall be delivered to the clerks of the several counties so that it may be in the possession of county boards of equalization on or before the second Monday in July." The second Monday of July fell on July 10, of this year and the report was dated July 12.

So far as here pertinent, the report issued by the Commission was as follows:

Honorable Paul J. Simon

REAL ESTATE		INCREASE	DECREASE	VALUATION
1-3. Lands . . . . .				None
4-6. Town Lots . . . . .				\$1,250,219,410
7. Total valuation of real estate . . . . .	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	\$1,250,219,410
TANGIBLE PERSONAL PROPERTY.				
8. Horses, mares and geldings . . . . .				\$ 9,000
9. Asses and jennets . . . . .				None
10. Mules . . . . .				None
11. Neat cattle . . . . .				5,010
12. Hogs . . . . .				60
13. Sheep . . . . .				190
14. Goats . . . . .				None
15. Rabbits, animals and other live stock . . . . .				None
16. Poultry . . . . .				None
17. Bee colonies . . . . .				None
18. Farm and other machinery . . . . .				6,540
19. Household property . . . . .				25,742,990
20. Motor vehicles, trucks, airplanes, motorcycles . . . . .		50%		82,261,895
21. All other tangible personal property not above enumerated . . . . .				100,628,620
22. Locally assessed tangible personal property of rail-road, telegraph, telephone, electric light, electric transmission, pipe line and bridge companies. Chapters 151 and 153, R. S. Mo. 1949 . . . . .				8,400,000
1959	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	
Total valuation of tangible personal property . . . . .	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	\$ 217,054,305
	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	
Total value, real and tangible personal . . . . .	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	\$1,467,273,715

Two contentions have been made questioning the validity of this report. The first is that the time requirement of Sections 138.390 and 138.400 is mandatory, and the Commission had no authority to act after the second Monday in July. (It should be noted that the verified abstract which the City assessor is required by Section 137.515, RSMo, to deliver to the Commission by the 20th day of June to enable it to determine the necessity of a valuation change was not delivered until July 3, 1967). The second argument is that the Commission had no authority to adjust the valuation of any property other than an entire class of property listed in Section 138.390, RSMo. In view of our opinion that the second contention is meritorious, we make no decision as to the merits of the first.

Section 138.390 requires the State Tax Commission to classify all tangible personal property into certain specified classifications

and to equalize the valuation of each class thereof among the respective counties by adding to or deducting from each class as necessary. The various classes of tangible personal property are listed in this section, and do not include as a special class "Motor vehicles, trucks, airplanes, motorcycles". These items must be considered as included within the general, inclusive class "other tangible personal property".

In attempting to segregate and equalize the valuation of a type of property not specifically classified, the Commission seeks to subclassify and adjust only a portion of a particular class of property within a county without disturbing the valuation placed upon another portion of the same class. This would constitute an intra-county equalization which the Courts of this state have consistently found to be beyond the power of the Commission except in accordance with its appellate authority to correct wrongful assessments of individual properties.

In our opinion, the decision in *State ex rel Wyatt v. Vaile*, 122 Mo. 33, 26 S.W. 672, is directly in point and determinative of the question. At the time of this decision, prior to the creation of the State Tax Commission, the State Board of Equalization was authorized "to adjust and equalize the valuation of real and personal property among the several counties of this state." Neither real nor personal property was further classified. The State Board of Equalization attempted to divide and adjust separately two subclasses of real estate within a county by an order to reduce the valuation of lands in Jackson County by twenty-five percent and town lots by fifty percent.

The Court held that the order was void as the State Board had no power to go into a county and equalize the value of parcels or classes of real estate therein. It could raise or decrease by a uniform percentage the valuation of all real property within a county or of all personal property within a county without disturbing the other, but, it could not adjust the values of different types or classes of real property within the same county.

This is what the Commission has attempted to do in this case. The result of its report and order would be to decrease within the City of St. Louis, the valuation of motor vehicles, trucks, airplanes, and motorcycles; property included within the class "other personal property", without disturbing or changing the valuation of other portions of the same class. Attempting to subclassify and adjust the valuation of only a portion of a class of property is tantamount to adjusting the valuation of individual items of property which is beyond the authority of the Commission except through appeal from the various Boards of Equalization. In *re St. Joseph's Lead Company*, Mo.Sup., 352 S.W.2d 656, 663; *Foster Bros. Mfg. Co. v. State Tax Commission*, Mo.Sup., 319 S.W.2d 590; *First Trust Company v. Wills*, Mo.Sup., 23 S.W.2d 108, 111; *State v. Dircks*, Mo.Sup., 11 S.W.2d 38.

Honorable Paul J. Simon

A letter was sent with the report of the State Tax Commission which, so far as here pertinent reads as follows:

"The Commission has issued an order to reduce the amount of (\$82,261,895) on 'other tangible personal property' which shall include all personal property other than 'banking corporations, railroad corporations, street railroad corporations, and all other corporations, horses, mares and geldings, mules, asses and jennets, neat cattle, sheep, swine, goats, domesticated small animals and all other livestock, poultry, power machinery, farm implements.'

The Commission is considering automobiles as 'other tangible personal property.'

It is therefore ordered that such reduction be applied to the valuation of the tangible personal property."

This letter indicates the intention of the Commission to decrease the valuation of all "other tangible personal property." But this is not what was done. If we consider "other tangible personal property" to include all such property not otherwise specifically classed by Section 138.390, the valuation must include not only the \$82,261,895 reduced valuation placed upon "Motor vehicles, trucks, airplanes, motorcycles" but also the \$100,628,620 valuation placed on "all other tangible personal property not above enumerated" and the \$25,742,990 valuation placed on "Household property" which also is not specifically classified by Section 138.390. A decrease of 50% of that amount would result in a decrease in the assessed valuation of \$145,447,700 rather than \$82,261,895 as the Commission indicated it desired.

It is our understanding that the reason for the proposed reduction was that the Commission felt that automobiles were given a higher assessment by the City of St. Louis than are given elsewhere in the State. Presuming this to be true, this fact in itself would not be sufficient to permit the decrease of the valuation of the class "other tangible personal property" unless it can be shown that the total value of all the property in this class is comparatively over valued. Even though automobiles may be over valued in St. Louis, other property, included in the class "other tangible personal property" may be equally under valued and no necessity would exist for raising or lowering the valuation of the entire class.

It is clear from the report that the Commission intended to decrease the valuation of "Motor vehicles, trucks, airplanes, motorcycles" only and not to adjust, except as a necessary incident, the valuation of "other tangible personal property." It is true that motor vehicles are unusually susceptible to exact valuation and therefore to inter-



Honorable Paul J. Simon

county equalization and that Section 138.390 which provides a separate classification for property such as "mules, asses and jennets" and "neat cattle" rather than motor vehicles might be considered obsolete. Nevertheless, however laudable its purpose, the State Tax Commission may only equalize each class as a whole and is not empowered to subdivide a class and attempt to equalize such a subclass within a particular county. This results in an intracounty equalization which is beyond the authority of the Commission and any order attempting to effect such a subclassification is void and of no effect.

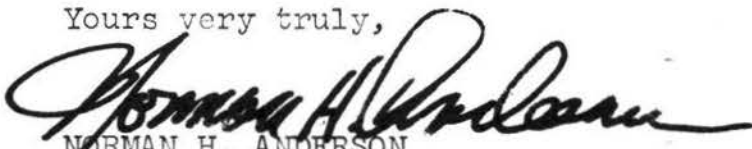
The General Assembly has established classifications of all tangible personal property and has authorized the State Tax Commission to equalize the valuation of tangible personal property of each class so established. Further classification of tangible personal property to include a separate class for "Motor vehicles, trucks, airplanes, motorcycles," is a legislative function and can be effectuated only by the General Assembly.

#### CONCLUSION

The State Tax Commission has no authority to equalize only a portion of any class of property established by Section 138.390, RSMo. Its report and order purporting to decrease the valuation of "Motor vehicles, trucks, airplanes, motorcycles" in St. Louis City by 50 per cent in effect subdivides the statutory class for "other tangible personal property" and establishes a new class. It is the opinion of this office that the report and order is beyond the power of the Commission and therefore, is void and without effect.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

ST. LOUIS HOUSING AUTHORITY:  
COLLECTIVE BARGAINING:  
POLITICAL SUBDIVISION:  
MUNICIPAL CORPORATION:  
PUBLIC BODY:

The St. Louis Housing Authority is a  
"public body" within the meaning of  
House Bill No. 166 of the Seventy-  
fourth General Assembly.

OPINION NO. 394

November 2, 1967



Honorable Thomas A. Walsh  
State Representative  
52nd District  
5850 Elizabeth Avenue  
St. Louis, Missouri 63110

Dear Representative Walsh:

This is in answer to your request for an opinion of this office,  
which request reads as follows:

"Is the St. Louis Housing Authority a 'public  
body' within the meaning and coverage of House  
Bill No. 166 as passed by the 74th General  
Assembly and signed by the Governor on June  
7, 1967, and to become effective October 13, 1967?"

House Bill No. 166 ~~repealed~~ Sections 105.500, 105.510, 105.520  
and 105.530, RSMo Supp. 1965, relating to public employees joining  
labor organizations and collective bargaining with public bodies  
and enacted in lieu thereof Sections 105.500, 105.510, 105.520,  
105.530 and 105.540 relating to the same subject.

Section 105.500 is the definition section and now defines  
"public body" as follows:

"(1) 'Public body' means the State of Missouri,  
or any officer, agency, department, bureau,  
division, board or commission of the state, or  
any other political subdivision of or within  
the state."

Therefore, if the St. Louis Housing Authority is a "public body"  
within the meaning of House Bill No. 166 it must be a "political  
subdivision."



Honorable Thomas A. Walsh

Chapter 99, RSMo, provides for the creation of the St. Louis Housing Authority and is known as "The Housing Authorities Law." Section 99.040, RSMo 1959, reads in part as follows:

"1. In each city (as herein defined) and in each county of the state there is hereby created a municipal corporation to be known as 'the housing authority' of the city or county; provided, however, that such authority shall not transact any business or exercise its powers hereunder until or unless the governing body of the city or the county, as the case may be, by resolution or other declaration shall determine at any time hereafter that there is need for an authority to function in such city or county. \* \* \*

The Supreme Court of Missouri, en banc in *Laret Inv. Co. v. Dickman*, 345 Mo. 449, 134 S.W.2d 65, determined that the St. Louis Housing Authority was a "municipal corporation" within the meaning of certain tax laws. The Court said, 1.c. S.W.2d 68:

"[2] The term 'municipal corporation' is sometimes used in a strict sense to designate a corporation possessing some specified power of local government. In a broader sense it includes public, or quasi public, corporations designed for the performance of an essential public service. See *Dillon on Municipal Corporations*, Fifth Ed. Sec. 32.

"This court has adopted the broader definition. In *State ex rel. Caldwell v. Little River Drainage District*, 291 Mo. 72, loc. cit. 79, 236 S.W. 15, loc. cit. 16, we said: 'In its strict and primary sense the term "municipal corporation" applies only to incorporated cities, towns, and villages, having subordinate and local powers of legislation. *Helier v. Stremmel*, 52 Mo. 309. But in the larger and ordinarily accepted sense the term is applied to any public local corporation, exercising some function of government, and hence includes counties, school district townships under township organization, special road districts and drainage districts'

"The broad definition of a municipal corporation requires that it be formed for the purpose of performing some governmental function. The General Assembly, in the Act under consideration,

Honorable Thomas A. Walsh

declared the Housing Authority to be a municipal corporation, defined its purposes, declared them to be governmental functions, and declared the existence of an urgent necessity for its services.

"[3-4] The finding and declaration of the General Assembly are not binding on this court, but are entitled to great weight. We do not know, and are not at liberty to ascertain, what evidence they had before them; we can only indulge the presumption that the evidence was sufficient to justify them in finding the existence of the conditions set forth in their declaration. We must presume that the declared purposes are 'public purposes' and 'governmental functions' unless it clearly appears that they are not in harmony with the provisions of the constitution. Ex parte Renfrow, 112 Mo. 591, loc. cit. 595, 20 S.W. 682; Halbruegger v. St. Louis, 302 Mo. 573, 262 S.W. 379; Jennings v. St. Louis 332, Mo. 173, 58 S.W.2d 979, 87 A.L.R. 365."

The Supreme Court of Missouri, en banc, in *St. Louis Housing Authority v. City of St. Louis*, 361 Mo. 1170, 239 S.W.2d 289, again determined that the St. Louis Housing Authority was a "municipal corporation", this time within the meaning of certain laws relating to the authority of municipalities or political subdivisions to execute cooperation agreements. The Court said, l.c. S.W.2d 294, 295:

"[12-15] A 'municipal corporation' is commonly called a 'municipality.' 62 C.J.S., *Municipal Corporations*, § 1, page 64; *State ex rel. Koontz v. Board of Park Commissioners*, 131 W.Va. 417, 47 S.E.2d 689, 694. By both judicial recognition and common usage 'municipality' is a modern synonym of 'municipal corporation'. 'Municipality' is all embracing. It includes, of course, cities of all classes, as well as towns, but it includes also a non-profit agency, such as plaintiff, which is authorized to exercise public and essential governmental functions. By the General Assembly plaintiff's status is declared to be a municipal corporation exercising public and essential government functions. Webster's New International Dictionary, 2nd Ed., defines municipality as a municipal corporation. The suffix 'ity' denotes state, or condition of being. Thus municipality connotes the state or condition of being municipal in nature. The

Honorable Thomas A. Walsh

word 'municipal' is derived from the latin 'municipalis', and implies the right of local self government. Municipality now has a broader meaning than 'city' or 'town', and presently includes bodies public or essentially governmental in character and function and distinguishes public bodies, such as plaintiff, from corporations only quasi-public in nature. 42 C.J. p. 1413; 61 C.J.S., Municipal, page 945; Curry v. Sioux City Dist. Tp., 62 Iowa 102, 17 N.W. 191. But the two terms (municipality and municipal corporation) are often interchangeably used. Likewise, 'municipal corporation', in the broader sense now includes public corporations created to perform an essential public service and 'is applied to any public local corporation exercising some function of government.' 'Municipal corporation' now also includes a corporation created principally as an instrumentality of the state but not for the purpose of regulating the internal local and special affairs of a compact community. Columbia Irrigation Dist. v. Benton County, 149 Wash. 234, 270 P. 813; 62 C.J.S., Municipal Corporations, § 5, page 76; State ex rel. Caldwell v. Little River Drainage District, 291 Mo. 72, loc. cit. 79, 236 S.W. 15; Laret Inv. Co. v. Dickman, supra; Dillon on Munic. Corp. 5th Ed. Sec. 32. Under the instant circumstances we are constrained to rule that both plaintiff and defendant are a 'municipality' as contemplated and used in Section 16 of Article VI of our Constitution and in R.S.Mo. 1949, § 70.220. Both are likewise a 'municipal corporation'. Under the above considered sections plaintiff and defendant clearly possess the constitutional and statutory authority to execute the instant Cooperation Agreement."

It therefore appears that the St. Louis Housing Authority is a "municipality" for certain purposes. However, it must still be determined that the St. Louis Housing Authority is a "political subdivision of or within the state" within the purview of House Bill No. 166.

There appears to be no general definition of "political subdivision." The term only has meaning within a specific context.

For example, Section 15, Article X, Constitution of Missouri, has the following definition:

Honorable Thomas A. Walsh

"The term 'other political subdivision,' as used in this article, shall be construed to include townships, cities, towns, villages, school, road, drainage, sewer and levee districts and any other public subdivision, public corporation or public quasi-corporation having the power to tax."

Article X, to which this definition applies, relates to the taxing power by state and local governments. This definition is not controlling here.

Section 3, Article V, Constitution of Missouri, states the jurisdiction of the Supreme Court. This provision, while not defining "political subdivision", provides in part as follows:

" \* \* \* in all civil cases where the state or any county or other political subdivision of the state or any state officer as such is a party, \* \* \* "

This provision has been strictly construed. The Supreme Court, in applying this section, has held that no city or town in this state is a subdivision of the state except the City of St. Louis. *Kansas City v. Neal*, 122 Mo. 232, 26 S.W. 695. The Court has also held the words "county or other political subdivision of the state" in such section to mean a county or such political subdivision as may be created having powers similar to those of a county, and do not include school districts, levee districts, drainage districts and such like minor political subdivisions of the state. *Wilson v. King's Lake Drainage and Levee Dist.*, 237 Mo. 39, 139 S.W. 136; *Wheat v. Platte City Ben. Assessment Special Road Dist. of Platte County*, 330 Mo. 1245, 52 S.W.2d 856, transferred 227 Mo.App. 869, 59 S.W.2d 88; *Normandy Consol. School Dist. of St. Louis County v. Wellston Sewer Dist. of St. Louis County*, Sup., 74 S.W.2d 621, transferred Mo.App., 77 S.W.2d 477. However, the Court has also held that an organized township in a county which has adopted township organization is a "political subdivision of the state". *Harrison and Mercer County Drainage Dist. v. Trail Creek Tp.*, 317 Mo. 933, 297 S.W. 1.

These cases are also not controlling here but illustrate the application of the term "political subdivision" within the meaning of a specific constitutional provision. Thus, a city is a "political subdivision" for purposes of Article X of the Constitution but not for Section 3 of Article V of the Constitution.

Furthermore, we note that Section 3 of Article V states "or other political subdivision of the state" where House Bill No. 166 states "or any other political subdivision of or within the state". (Emphasis added)

Honorable Thomas A. Walsh

The conclusion to be reached by reason of the above discussion and citations is that each law using the term "political subdivision" must be interpreted separately within the context of the specific law. This does not mean, however, that cases ruling on other laws should necessarily be ignored but rather general language may be looked to to determine the nature of the entity in question. In this case attention should also be paid to the legislative intent.


It is our opinion that "public body" as defined in House Bill No. 166 should be construed broadly in view of the language "or any other political subdivision of or within the state". (Emphasis added) Therefore, the St. Louis Housing Authority, which has been said to be a "municipal corporation", is in our opinion a "public body" within the meaning of House Bill No. 166.

#### CONCLUSION

It is the opinion of this office that the St. Louis Housing Authority is a "public body" within the meaning of House Bill No. 166 of the Seventy-fourth General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General



HOUSING AUTHORITY: Housing authorities of Missouri have the power under Sections 99.090 and 99.100, RSMo 1959, to establish fixed rents for like housing units and are not bound to establish rent as a percentage of the tenants' income.

OPINION NO. 397

October 24, 1967

Honorable William C. Phelps  
State Representative--4th District  
1701 Bryant Building  
Kansas City, Missouri 64106



Dear Representative Phelps:

This is in answer to your letter requesting an opinion which reads in part as follows:

"I hereby request an Attorney General's opinion on the question of whether the housing authorities of Missouri have the power to establish fixed rents on like housing units or are the authorities bound to establish rents as a percentage of the tenant's income."

As you have stated in your letter, Sections 99.090 and 99.100, RSMo 1959, govern in this situation.

Section 99.090, RSMo 1959, states:

"It is hereby declared to be the policy of this state that each housing authority shall manage and operate its housing projects in an efficient manner so as to enable it to fix the rentals for dwelling accommodations at the lowest possible rates consistent with its providing decent, safe and sanitary dwelling accommodations, and that no housing authority shall construct or operate any such project for profit, or as a source of revenue to the city or the county. To this end an authority shall fix the rentals for dwellings in its projects at no higher rates than it shall find to be necessary in order to produce revenues which (together with all other available monies, revenues, income and receipts of the authority from whatever sources derived) will be sufficient



Honorable William C. Phelps

(1) To pay, as the same become due, the principal and interest on the bonds of the authority;

(2) To meet the cost of, and to provide for, maintaining and operating the projects (including the cost of any insurance) and the administrative expenses of the authority; and

(3) To create (during not less than the six years immediately succeeding its issuance of any bonds) a reserve sufficient to meet the largest principal and interest payments which will be due on such bonds in any one year thereafter and to maintain such reserve."

Section 99.100, RSMo 1959, states in part as follows:

"In the operation or management of housing projects an authority shall at all times observe the following duties with respect to rentals and tenant selection:

(1) It may rent or lease the dwelling accommodations therein only to persons of low income and at rentals within the financial reach of such persons of low income;

(2) It may rent or lease to a tenant dwelling accommodations consisting of the number of rooms (but no greater number) which it deems necessary to provide safe and sanitary accommodations to the proposed occupants thereof, without overcrowding; and

(3) It shall not accept any person as a tenant in any housing project if the person or persons who would occupy the dwelling accommodations have an annual net income in excess of five times the annual rental of the quarters to be furnished such person or persons, except that in the case of families with three or more minor dependents, such ratio shall not exceed six to one; in computing the rental for this purpose of selecting tenants, there shall be included in the rental the average

Honorable William C. Phelps

annual costs (as determined by the authority) to occupants of heat, water, electricity, gas, cooking range and other necessary services or facilities, whether or not the charge of such services and facilities is in fact included in the rental."

Since both of these sections set out above are directly in point they must be read and construed together with effect given to all provisions if possible as was intended by the legislature. See *Mitchum vs. Perry*, 390 S.W. 2d 600.

Considering Section 99.090, *supra*, it essentially states that the housing authority shall manage and operate its housing projects so as to fix the rentals for dwelling therein at a rate as low as possible, charging only that amount which it shall find necessary to produce revenues which will: (1) pay the principal and interest on the bonds of the authority; (2) meet the cost of maintaining and operating the projects; and, (3) create a sufficient reserve to meet the largest principal and interest payments which will be due on such bonds in any one year thereafter.

Section 99.100, RSMo 1959, states essentially that in the management of the housing projects the authority shall observe the following rules: (1) It may rent or lease the dwelling accommodations only to persons of low income; (2) It may rent or lease the tenant dwelling accommodations consisting of only the number of rooms which is necessary to provide safe and sanitary accommodations; and, (3) It shall not accept any person as a tenant in the housing project if the person or persons who occupy the dwelling accommodations have an annual net income in excess of five times the annual rental or six times the annual rental where there are three or more minor tenants. This last section goes on further to state that the cost to occupants of heat, water, electricity, gas, cooking range and other necessary services or facilities shall be included in the rental.

Considering these two sections together, it is apparent that Section 99.090, RSMo 1959, first requires the housing authorities to rent the housing as cheaply as possible and at the same time meet all the financial obligations enumerated in said statute. Secondly, it is also apparent that Section 99.100, RSMo 1959, imposes an additional limitation which we are concerned with here, that being that the housing authority shall not accept any person as a tenant in any housing project if that person has a net income in excess of five or six times the annual rental to be charged, this limitation depending on the number of minor dependents of the tenant as set out in the statute.

Honorable William C. Phelps

It is our opinion that the answer to your question is as simple as it may seem. The housing authorities of Missouri not only have the power to establish fixed rents, but are required to do so by Section 99.090, RSMo 1959, in accordance with the provisions set out therein. They are likewise required to select tenants which meet the statutory provisions of Section 99.100, supra, the provision of immediate concern being that the tenant not have an annual income in excess of five or six times the annual rent set by the housing authority, said annual rent to include the cost of heat, water, electricity, gas, cooking range and other necessary services or facilities. It is noted that another construction has been suggested by the Federal Housing Authority in regard to Section 99.100, RSMo 1959; that being that the rent charged for a housing authority unit must be set as a percentage of the particular occupant's income. However, to give such a construction to Section 99.100, RSMo 1959, would be to virtually ignore the provisions of Section 99.090, RSMo 1959, since setting the annual rent of a housing authority unit at a percentage of the tenant's income would make it virtually impossible for the housing authorities to set the rent as low as possible and at the same time be assured of having ample revenue to (1) pay the principal and interest, (2) meet the cost of maintaining and operating the project, and (3) create a sufficient reserve to meet the largest principal and interest payments which will be due in any one year thereafter. In other words, if the housing authority is bound to set the rent at a percentage of its tenants' incomes, it has no certain way of ascertaining what the income will be, thus no way of ascertaining what the rent collected will be.

To further support this construction of the aforementioned statutes, attention is directed to the phrase: " \* \* \* in computing the rental for this purpose of selecting tenants, there shall be included in the rental the average annual cost (as determined by the authority) to occupants of heat, water, electricity, gas, cooking range and other necessary services or facilities, \* \* \*." When this phrase is considered in light of the remainder of the statute, it seems abundantly clear that the phrase "in computing the rental" refers to the process of arriving at the annual rental, which is to be used in selecting tenants, and not to the criteria for setting the rental rate of a tenant.

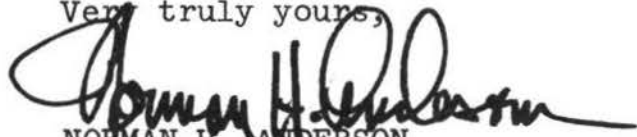
#### CONCLUSION

This office is of the opinion that the housing authorities of Missouri have the power under Sections 99.090 and 99.100, RSMo 1959, to establish fixed rents for like housing units and are not bound to establish rent as a percentage of the tenants' income.

Honorable William C. Phelps

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. Michael Lorch.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Norman H. Anderson", written over the typed name.

NORMAN H. ANDERSON  
Attorney General

PEACE OFFICERS:  
FIREARMS:  
WEAPONS:  
ALDERMAN:  
PUBLIC OFFICERS:

In cities of the Fourth Class  
an alderman may not be appointed  
a special police officer; and an  
alderman, by virtue of his office  
as alderman, is not empowered to  
carry firearms.

OPINION NO. 404

October 19, 1967

Honorable E. J. Cantrell  
State Representative - 33rd District  
St. Louis County  
3406 Airway  
Overland, Missouri 63114



Dear Representative Cantrell:

This is in response to your request for an opinion from  
this office, which request asks:

- "1. In cities of the 4th class, may an  
Alderman be appointed a Special  
Police Officer?"
- "2. May an Alderman, by virtue of his office  
as Alderman, be empowered to carry  
fire-arms?"

In answer to question number one, generally one person  
may hold several public offices simultaneously unless pro-  
hibited by statute or constitution, or prohibited by the  
common law rule against simultaneous holding of two incompati-  
ble offices.

No known Missouri statute, including the new conflict of  
interest statutes, prohibits one person from simultaneously  
holding the office of alderman and special police officer of  
a Fourth Class City. Therefore, the rule at common law is de-  
terminative in this instance.

- "1. The rule at common law is well settled  
that where one, while occupying a public  
office, accepts another, which is incompat-  
ible with it, the first will ipso facto  
terminate without judicial proceeding or any  
other act of the incumbent. The acceptance  
of the second office operates as a resignation  
of the first." State vs. Bus, Mo., 36 S.W. 636, 637.

Honorable E. J. Cantrell

The question, therefore, becomes whether the offices of an alderman and special police officer of a Fourth Class City are incompatible.

There seems to be no universally applicable rule whereby a quick and accurate determination of incompatibility can be made. The determination must be made on a case to case basis. State vs. Grayston, Mo., 163 S.W. 2d 335,339. Although there may be no universal rule of decision, there are certain guides helpful in each determination. In an early Montana case, the court set out the following guides:

" \* \* \* \* Offices are 'incompatible' when one has power of removal over the other (29 Cyc. 1382; Attorney General v. Council, 112 Mich. 145, 70 N.W. 450, 37 L.R.A. 211), when one is in any way subordinate to the other (State v. Jones, 130 Wis. 572, 110 N.W. 431, 8 L.R.A. [N.S.] 1107, 118 Am. St. Rep. 1042, 10 Ann. Cas. 696), when one has power of supervision over the other (State v. Taylor, 12 Ohio St. 130; Cotton v. Phillips, 56 N.H. 220; State v. Hilton, 80 N.J. Law, 528, 78 Atl. 16), or when the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both. \* \* \* \* " State vs. Wittmer, Mont., 144 P. 648,649.

Other cases have held offices to be incompatible when: (a) one is subordinate to the other; (b) one has supervisory power over the other; (c) one has power of appointment or power of removal over the other; (d) one audits the others accounts. 67 C.J.S. Officers, Section 23, page 135. With these guidelines in mind, the next consideration becomes, what are the respective duties of an alderman and a special police officer in a Fourth Class City?

A special police officer in cities of the Fourth Class is an appointive office. Section 85.620, RSMo 1959. Section 79.240, RSMo 1959 in pertinent part provides for the removal of any appointive officer of the city at will by the mayor with the consent of a majority of all the members elected to the Board of Alderman; or for the removal of any appointive officer by a two-thirds vote of all members elected to the Board of Alderman. Thus, the Board of Alderman has power of removal over a special police officer.



Honorable E. J. Cantrell

Since the Board of Alderman does have the power of removal over a special police officer, it is readily seen that the offices of an Alderman and special police officer may be considered incompatible. Also, due to the fact that a police officer exercises a great deal of authority inherent in his position, it is thought apparent that said officer in the event of misconduct should be removed from office immediately. It is further apparent that if one were a police officer and a member of the Board of Alderman, said person would have some control over whether he would or would not be relieved of his position. This in itself supports a finding of incompatibility. Therefore, it is believed incumbent on this office to find that an alderman, appointed a special police officer, violates the common law rule of incompatibility and thus cannot serve simultaneously as an alderman and a special police officer.

In regard to your second question, it is thought that Section 564.610, V.A.M.S., Laws of 1967, is controlling. For clarity said statute is set out below:

"If any person shall carry concealed upon or about his person a dangerous or deadly weapon of any kind or description, or shall go into any church or place where people have assembled for religious worship, or into any school room or place where people are assembled for educational, political, literary or social purposes, or to any election precinct on any election day, or into any courtroom during the sitting of court, or into any other public assemblage of persons met for any lawful purpose other than for militia drill, or meetings called under militia law of this state, having upon or about his person, concealed or exposed, any kind of firearms, bowie knife, springback knife, razor, metal knucks, billy, sword cane, dirk, dagger, slung shot or other similar deadly weapons or shall, in the presence of one or more persons, exhibit any such weapons in a rude, angry or threatening manner, or shall have any such weapon in his possession when intoxicated, or, directly or indirectly, sell or deliver, loan or barter to any minor any such weapon, without the consent of the parent or guardian of such minor, he shall, upon conviction, be punished by imprisonment by the department of corrections for not more than five years, or by imprisonment in the county jail not less than fifty days nor more than one year, but nothing contained in this section shall

Honorable E. J. Cantrell

apply to legally qualified sheriffs, police officers and other persons whose bona fide duty is to execute process, civil or criminal, make arrests, or aid in conserving the public peace, nor to persons traveling in a continuous journey peaceably through this state. As amended Laws 1965, p. 673, § 1, as amended Laws 1967, p. \_\_\_\_, H.B.No.331, § 1."

It is noted that the above section applies to any person and excludes only legally qualified sheriffs, police officers, and other persons whose bona fide duty is to execute process, civil or criminal, make arrests, or aid in conserving the public peace. Looking then to the duties of an alderman of a Fourth Class City as set out in Chapter 79, RSMo 1959, it is readily seen that the duties of an alderman do not include making arrests, executing process, civil or criminal, or aiding in conserving the public peace, that is, as a "bona fide duty" of his office as alderman.

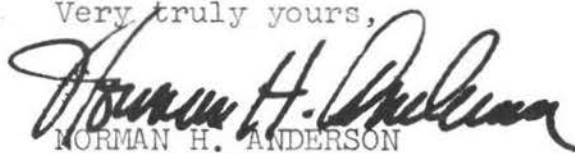
Therefore, it is the opinion of this office that an alderman, by virtue of his office as alderman, is not excluded from the operation of Section 564.610, RSMo 1959, and therefore, is not empowered to carry firearms any more than any other ordinary citizen, and would in fact violate said section if he were to carry a firearm in any manner set out therein.

#### CONCLUSION

From the above considerations, it is the opinion of this office that in cities of the Fourth Class an alderman may not be appointed a special police officer; and an alderman, by virtue of his office as alderman, is not empowered to carry firearms.

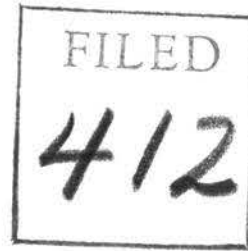
The foregoing opinion which I hereby approve was prepared by my Assistant, L. Michael Lorch.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General

December 19, 1967



OPINION NO. 412  
(Answered by Letter-Duff)

Honorable James L. Paul  
Prosecuting Attorney  
McDonald County  
Pineville, Missouri 64856

Dear Mr. Paul:

Please find enclosed Attorney General's Opinion No. 52 issued to the Honorable Walter R. Lethem, Jr., on January 25, 1952. I think this opinion fully answers the questions concerning Sections 56.120 and 56.130, RSMo 1959, that you raised in your letter of October 11, 1967.

A special prosecutor is limited to the fee provided by law to be taxed and paid as costs in all cases in which he is employed. Section 56.130, RSMo 1959. He cannot be paid from public funds. The reasoning in *State ex rel Harrison v. Patterson*, 152 Mo. App. 264, 132 S.W. 1183, applies here:

"It is well-settled law in this state that the right to compensation for the discharge of official duties is purely a creature of the statute, and that the statute which is claimed to confer that right must be strictly construed. The right of a public officer to compensation is derived from the statute and he is entitled to none for services he may perform as such officer, unless the

Honorable James L. Paul

statute gives it. . . . It is one thing to make a disabled or absent servant pay for substituted services out of his own pocket, and another and entirely different thing for the master to pay twice for the same service.'" Id. at 1185.

If you have any further questions we will be happy to consider them.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

DD:lch:fb

Enclosure

COUNTY HOSPITALS:  
COUNTY NURSING HOMES:

An existing county hospital facility may be converted into a county nursing home under the provisions of Section 205.375, RSMo.,

1959 by the county court with the permission of the hospital Board of Trustees. Also the Hospital Board of Trustees have no statutory authority to continue to control and manage the facility after it has been converted into a nursing home and that the primary duty in regard to this rests in the county court under Section 205.375.

OPINION NO. 414

December 21, 1967



Honorable James Millan  
Prosecuting Attorney  
Pike County  
Courthouse  
Bowling Green, Missouri

Dear Mr. Millan:

This is in response to your request for an opinion which you made to this office in your letter of October 12, 1967. We will first outline the facts which give rise to your request.

Pike County presently has a county hospital operated by a Board of Trustees in accordance with Sections 205.160 to 205.340, RSMo., 1959. The Board of Trustees has decided to build a new building which will be situated so that it is connected to the old one. The Board and the county court want to convert the old facility into a convalescent care or nursing home and make the new facility into a hospital. At the same time, they would like to leave both under the jurisdiction and management of the hospital Board of Trustees.

The questions which you ask, then, may be posed in the following manner. May a building, which has been operated as a county hospital under Section 205.160, RSMo., 1959 and the sections there following, (1) be turned into a county nursing home under Section 205.375, RSMo., 1959, and, if so, (2) can it remain under the jurisdiction of the county hospital board of trustees?

The first question to be considered is whether or not the old hospital facility can be transformed into a nursing home. Section 49.270, RSMo., 1959 gives the county court the power to control and manage all property belonging to the county including the power to sell and convey real estate. While the county itself is the "owner" of county property, the effective exercise of that ownership is vested in the county court. Therefore, an existing county hospital, title to which is in the county, is property that is under the control and management of the county court by virtue of Section 49.270.

Honorable James Millan

The county court has power to set up county nursing homes under Section 205.375. In pursuance of this power, it may, among other things, acquire land, construct and equip the nursing home, issue bonds as authorized by law, and provide for the leasing and renting of the nursing home. We hold that this grant of power also enables the county court to take existing county property which it already controls and use it for the purpose of establishing a nursing home. This is a valid use of county property for a legitimate county purpose, and is in line with a previous holding of this office to the effect that a county court could sell county property and use the proceeds to set up a nursing home. Opinion Attorney General, No. 4, 8-8-57.

It should be noted that our decision presupposes that the hospital Board of Trustees approve the transformation of the building from a hospital to a nursing home. The complete care and custody of the county hospital is vested in the Board of Trustees by Section 205.190 (4) RSMo., 1959. A previous opinion of this office, Opinion Attorney General, No. 72, 7-11-57, held that the county court could not convey hospital real estate without the consent of the hospital Board of Trustees even though the title to the real estate was in the county alone. Using the same reasoning, we conclude that the county court cannot transform a hospital into a nursing home completely at will and must first obtain the consent of the hospital Board of Trustees.

The first question can be answered by saying that the old hospital may be transformed into a nursing home if the county court obtains the approval of the hospital Board of Trustees.

The second question is whether or not the county hospital Board of Trustees can continue to control and manage the old building after it has been turned into a nursing home. Section 205.375 says that the county court may rent or lease the nursing home to non-profit organizations who will run it according to the purposes provided for by that section. This raises the question whether the hospital board could become a lessee of the old building for the purpose of operating it in conjunction with the new hospital building. While the applicable statutes, Sections 205.160 to 205.340, do not answer this question directly, they do not give the hospital Board of Trustees any power to run nursing homes. All of their authority is directed toward the operation of county hospitals and county nursing homes cannot, by definition, be termed county hospitals. Opinion Attorney General, No. 196, 3-28-66.

Even though the county court has authority to lease a nursing home under Section 205.375, the hospital Board of Trustees has no authority under Sections 205.160 to 205.340 to accept the responsibility for controlling and managing a nursing home. Therefore, it is the opinion of this office that when a building is converted from a hospital to a nursing home with the consent of the hospital trustees, it is no longer under the jurisdiction of the hospital Board of Trustees and they cannot manage it as a nursing home.



Honorable James Millan

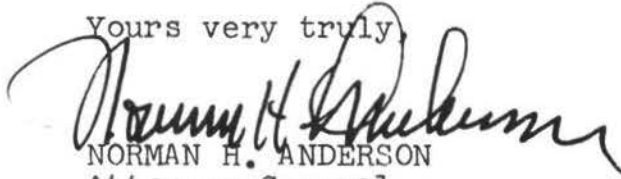
CONCLUSION

It is the opinion of this office that an existing county hospital facility may be converted into a county nursing home under the provisions of Section 205.375, RSMo., 1959 by the county court with the permission of the hospital Board of Trustees.

However, it is also the opinion of this office that the hospital Board of Trustees have no statutory authority to continue to control and manage the facility after it has been converted into a nursing home and that the primary duty in regard to this rests in the county court under Section 205.375.

The foregoing opinion which I hereby approve was prepared by my assistant, Gary G. Sprick.

Yours very truly,



NORMAN H. ANDERSON  
Attorney General

SHERIFFS:  
OFFICERS:  
COUNTY OFFICERS:  
COMPENSATION:  
FEES:  
ACCOUNTABLE FEES:

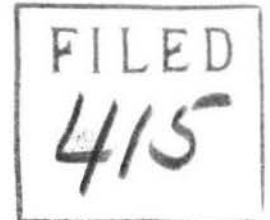
Sheriffs of third and fourth class counties may under Senate Bill 237 enacted by the Seventy-fourth General Assembly retain all non-accountable civil fees received by them as of October 13, 1967, even though the amounts exceed the annual limits set by Senate Bill 237. Sheriffs who have received

fees up to or in excess of the limits set by Senate Bill 237 as of October 13, 1967, are not entitled to retain any civil fees received between October 13, 1967, and January 1, 1968. Sheriffs who have not received civil fees up to the limits set by Senate Bill 237 as of October 13, 1967, may retain all civil fees received after that date and up to January 1, 1968 until the limits of Senate Bill 237 are reached.

The expenses that a sheriff of a third or fourth class county may receive under Section 548.241, RSMo 1959, are not received in his official capacity as sheriff and therefore are not subject to the provisions of Senate Bill 237.

OPINION NO. 415

NOVEMBER 21, 1967



Honorable Haskell Holman  
State Auditor  
State of Missouri  
Capitol Building  
Jefferson City, Missouri

Dear Mr. Holman:

This is in answer to your request for an opinion asking several questions concerning Senate Bill 237 enacted by the Seventy-fourth General Assembly.

The first question reads as follows:

"Are the maximum amounts of \$12,500.00 and \$10,000.00 which sheriffs of third and fourth class counties, respectively, are allowed to retain under the provisions of Senate Bill 237 applicable for the year 1967, or would the sheriffs be entitled to retain all civil (non-accountable) fees received by them prior to October 13, 1967?"

The applicable portion of Senate Bill 237 reads as follows:

Honorable Haskell Holman

"3. Any other provision of law notwithstanding, the sheriffs in each county of the third class shall retain only that portion of fees other than reimbursable expenses allowed to him by law which, together with all other remuneration provided by law, shall not exceed the sum of twelve thousand five hundred dollars. The balance of such fees shall be paid into the county treasury.

"4. Any other provision of law notwithstanding, the sheriff in each county of the fourth class shall retain only that portion of fees other than reimbursable expenses allowed to him by law which, together with all other remuneration provided by law, shall not exceed the sum of ten thousand dollars. The balance of such fees shall be paid into the county treasury."

Senate Bill 237 became law on October 13, 1967. Section 1.130, RSMo 1959. Prior to October 13, 1967, there was no limit on the amount of civil fees that could be retained by sheriffs of third and fourth class counties.

The fees allowed by law which now may be retained up to a certain amount above "other remuneration" are non-accountable fees received for services in civil matters. Section 13, Article VI, Constitution of Missouri; Section 57.410, RSMo 1959; and Attorney General Opinion No. 374, dated October 17, 1967, issued to the Honorable Haskell Holman (copy enclosed). That opinion also discusses and rules on what constitutes "remuneration."

Section 13, Article VI, provides in part as follows:

" \* \* \* Any fees earned by any such officers in civil matters may be retained by them as provided by law."

Such officers include sheriffs of third and fourth class counties.

Section 57.410, supra, relating to sheriffs of third and fourth class counties, provides in part as follows:

" \* \* \* The sheriff may retain all fees collected by him in civil matters."

Civil fees which may be retained by sheriffs of third and fourth class counties are set out in Section 57.280, RSMo 1959. This section lists the services for which fees are allowed and the amount of the fee for each service. The section is silent as to time and method of payment. Therefore, prior to the enactment of Senate Bill 237

Honorable Haskell Holman

these fees, since they were non-accountable, could be retained by the sheriffs upon payment. The effect of Senate Bill 237 is to make all fees above the twelve thousand five hundred and ten thousand limits accountable. That would necessarily mean that the fees up to the limits are subject to record keeping although not strictly accountable.

The first question that must be answered is whether a sheriff who prior to October 13, 1967, already collected fees up to or in excess of the limits set by Senate Bill 237 may retain the full amount or whether he must account for the fees in excess of the limits.

Generally, statutes are construed to operate prospectively unless legislative intent that they be given retrospective or retroactive operation clearly appears from express language of acts, or by necessary or unavoidable implication. State ex rel. Clay Equipment Corp. v. Jensen, Mo., 363 S.W.2d 666. Statutes affecting substantive rights are not construed retrospectively in the absence of clearly expressed legislative intent. Center School Dist. Mo. 58 of Jackson County v. Kenton, Mo., 345 S.W.2d 120. A statute will generally be given a prospective operation, although expressed in the present tense. State ex rel. St. Joseph Lead Co. v. Jones, 270 Mo. 230, 192 S.W.2d 980. The word "shall", as used in a statute, ordinarily applies to something to be done or to take place in the future. Minter v. Bradstreet Co., 174 Mo. 444, 73 S.W. 668.

It is our opinion that Senate Bill 237 is not retrospective; and thus sheriffs of third and fourth class counties may retain all civil fees received prior to October 13, 1967, even though the amounts exceed the annual limits set by Senate Bill 237.

The next question, then, is whether the limits set by Senate Bill 237 are applicable to civil fees received between October 13, 1967, and January 1, 1968,

It is our opinion that the limits set by Senate Bill 237 do apply to fees received after October 13, 1967. Accordingly, sheriffs who have received fees up to or in excess of the limits set by Senate Bill 237 as of October 13, 1967, are not entitled to retain any civil fees received between October 13, 1967, and January 1, 1968. Sheriffs who have not received civil fees up to the limits set by Senate Bill 237 as of October 13, 1967, may retain all civil fees received after that date and up to January 1, 1968, until the limits of Senate Bill 237 are reached. The limits for this last situation are determined by all the civil fees received during the entire year of 1967.

Your second question reads as follows:

"In the event a sheriff of either a third or fourth class county is designated by name and official title of office to act as an agent

Honorable Haskell Holman

of the Governor under the provisions of Section 548.221, RSMo., 1959, would the amount of expenses received from the state or county under the provisions of paragraphs 1 and 2, respectively, Section 548.241, RSMo., 1959 be considered as reimbursable expenses or should such amount be included in the fees in determining the maximum amounts retainable under the provisions of paragraphs 3 and 4 Section 2 Senate Bill 237?"

We have already quoted paragraphs 3 and 4 of Section 2 of Senate Bill 237 which set limits on fees allowed by law other than reimbursable expenses which may be retained by sheriffs of third and fourth class counties.

Chapter 548, RSMo, is Missouri's extradition law and Section 548.221, RSMo 1959, reads as follows:

"Whenever the governor of this state shall demand a person charged with crime or with escaping from confinement or breaking the terms of his bail, probation or parole in this state, from the executive authority of any other state, or from the chief justice or an associate justice of the supreme court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this state, to some agent, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this state in which the offense was committed."

A sheriff of a third or fourth class county may be designated an agent under this section.

Section 548.241, RSMo 1959, provides for expenses in connection with extradition and reads as follows:

"1. Except as in this section otherwise provided, all expenses accruing under section 548.221 upon being ascertained to the satisfaction of the governor, shall be allowed on his certificate and paid out of the state treasury as other demands against the state.

"2. Expenses incident to the extradition of any person charged with violating section 559.350, RSMo, shall be paid by the county in which the offense is alleged to have been committed. Application for the payment of the



Honorable Haskell Holman

expenses shall be made by the agent designated by the governor and filed in the office of the county clerk or of the comptroller of the city of St. Louis. The application shall state the name of the accused and the time, place and pertinent facts of the alleged offense and shall include an itemized statement of the necessary and actual expenses incurred in the extradition of the person and shall be signed and verified by the applicant. The county court or the comptroller of the city of St. Louis, if the application and statement are found correct, shall issue appropriate warrants for the payment of the expenses out of the county or city treasury."

Enclosed is a copy of Attorney General Opinion No. 33, dated August 2, 1948, issued to the Honorable Charles E. Ginn, holding that when a sheriff is designated by the Governor as agent under these laws he is not acting in his official capacity as sheriff and therefore is entitled to retain expenses paid to him. Since the sheriff is not acting in his official capacity the expenses he receives under Section 548.241, RSMo 1959, are not subject in any way to the provisions of Senate Bill 237.

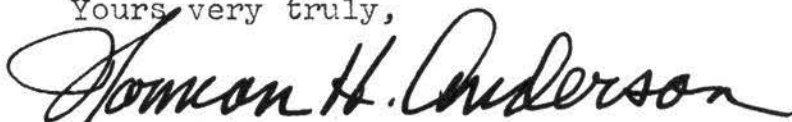
#### CONCLUSION

It is the opinion of this office that sheriffs of third and fourth class counties may under Senate Bill 237 enacted by the Seventy-fourth General Assembly retain all non-accountable civil fees received by them as of October 13, 1967, even though the amounts exceed the annual limits set by Senate Bill 237. Sheriffs who have received fees up to or in excess of the limits set by Senate Bill 237 as of October 13, 1967, are not entitled to retain any civil fees received between October 13, 1967, and January 1, 1968. Sheriffs who have not received civil fees up to the limits set by Senate Bill 237 as of October 13, 1967, may retain all civil fees received after that date and up to January 1, 1968, until the limits of Senate Bill 237 are reached.

It is our further opinion that the expenses that a sheriff of a third or fourth class county may receive under Section 548.241, RSMo 1959, are not received in his official capacity as sheriff and therefore are not subject to the provisions of Senate Bill 237.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Yours very truly,



NORMAN H. ANDERSON  
Attorney General

Enclosures: Op. No. 374, 10/17/67-Holman Op. No. 33, 8/2/48-Ginn



ELECTIONS: No deviations from the voting hour provisions  
PUBLIC WATER SUPPLY of Section 111.370, RSMo., which are adopted  
DISTRICT: by Section 247.180, RSMo., applicable to public  
VOTING HOURS: water supply districts, are authorized and  
that only literal compliance with those provisions constitutes legal compliance.

OPINION NO. 419

November 21, 1967

Honorable George W. Parker  
State Representative - District 120  
Missouri House of Representatives  
507 E. Rollins  
Columbia, Missouri 65201



Dear Representative Parker:

This is in reply to your letter of October 19, 1967, in which you requested an opinion on a question which we have chosen to phrase as follows:

Must elections in public water supply districts organized under Section 247.180 RSMo be conducted strictly in compliance with the law relating to state and county elections, or may there be some reasonable deviation in the manner in which the water district elections are held, especially in regard to the time that the polls must be held open?

Section 247.180, RSMo states that . . . "the manner of conducting elections of the district and the hours of voting shall be the same as provided by law for state and county elections". This makes the general election law embodied in Chapter 111, RSMo., applicable to elections of the water district, at least insofar as the manner of conducting the elections and the hours of voting are concerned. The sections of Chapter 111 which are made applicable to the elections of water districts by Section 247.180, RSMo are not specifically spelled out but certainly Section 111.370, RSMo which provides for the hours of voting is one section that is referred to by Section 247.180, RSMo.

Honorable George W. Parker

Since the specific question which has been raised concerns voting hours, we will limit our discussion to it.

The literal language of Section 247.180, RSMo., does not provide for any deviation from the general election law when it says that ". . .the hours of voting shall be the same as provided by law for state and county elections". (emphasis added). No alternative provisions are set forth and nothing more is said about voting hours in that part of Chapter 247 which deals with elections of county water districts. A similar provision is found in Section 247.600, RSMo., which deals with elections of water districts in metropolitan areas. We know of no case in which either of these sections has been construed or interpreted by the courts.

The general election law relating to voting hours for state and county elections is set forth in Section 111.370, RSMo. Supp. 1965, which reads as follows:

"The judges of each election hereafter to be held, general or municipal, shall open the polls at six o'clock in the morning and continue them open until seven o'clock in the evening, unless the sun shall set after seven o'clock, when the polls shall be kept open until sunset, except in first class counties having a charter form of government and in counties of the second class containing all or part of a city over four hundred thousand and in cities in the state of twenty-five thousand inhabitants or upward, when the polls shall be opened at six o'clock in the morning and be kept open until seven in the evening."

The time during which the polls shall be open is legally set by statute and no provision is found which authorizes deviations from these hours. It is true that the force of Section 111.370, RSMo has been held to be directory and not mandatory in cases where an election was challenged because the polls were not held open during the hours prescribed by statute. State ex rel City of Memphis vs. Hackman (1918), 202 S.W.7, 273 Mo. 670. We do not express an opinion as to what a court might do after an election where all of the election laws were not strictly followed.

Honorable George W. Parker


It is the duty of election authorities to obey the law and the law states that the polls in water district elections shall be kept open during the usual voting hours for state and county elections. It is our opinion that the election authorities could be required by mandamus proceedings to keep the polls open during the hours set by statute whether they are considered to be mandatory or directory. We hold that a water district election under Section 247.180, RSMo must be conducted in compliance with the voting hour provisions of Section 111.370, RSMo.

CONCLUSION

It is the opinion of this office that no deviations from the voting hour provisions of Section 111.370, RSMo which are adopted by Section 247.180, RSMo., applicable to public water supply districts, are authorized and that only literal compliance with those provisions constitutes legal compliance.

The foregoing opinion which I hereby approve was prepared by my assistant, Gary G. Sprick.

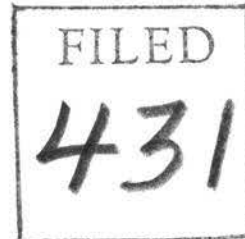
Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

November 17, 1967

OPINION NO. 431  
Answered by letter-Denman

Honorable E. J. Cantrell  
State Representative  
33rd District  
3406 Airway  
Overland, Missouri 63114



Dear Representative Cantrell:

This is in answer to your request for an official opinion of this office which reads as follows:

"Does House Bill #143, as passed during the 74th General Assembly, apply to paid employees of Fire District Employees as well as to Municipal Fire Department Employees?"

The Bill in question provides that:

"Section 1. Notwithstanding the provisions of any law to the contrary, after five years service, any condition of impairment of health caused by any disease of the lungs or respiratory tract, hypertension, or disease of the heart resulting in total or partial disability or death to a uniformed member of a paid fire department, who successfully passed a physical examination within five years prior to the time a claim is made for such disability or death, which examination failed to reveal any evidence of such condition, shall be presumed to have been suffered in line of duty, unless the contrary be shown by competent evidence.

"This act shall apply only to the provisions of Chapter 87, RSMo, 1959."

Chapter 87, RSMo 1959, entitled "Firemen's Retirement And Relief Systems" provides for pension plans for firemen employed by

Honorable E. J. Cantrell

cities, villages or incorporated towns. Section 87.010. There is no mention of employees of fire prevention districts authorized by Chapter 321, RSMo 1959, as amended.

The second paragraph of House Bill 143 specifically provides that the bill shall apply only to the provisions of Chapter 87 which would seem to be a clear declaration that its provisions do not apply otherwise.

As originally introduced, the bill did not contain this paragraph but it is now contained in the bill as "Truly Agreed To and Finally Passed". Therefore, it is our opinion that the provisions of House Bill 143 apply only to the provisions of Chapter 87 and do not apply to fire prevention districts.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

JHD:maw

December 21, 1967

OPINION NO. 433  
Answered by Letter  
(Brannock)

Honorable Donald L. Manford  
State Representative - District 18  
Missouri House of Representatives  
9409 Oakland  
Kansas City, Missouri 64138



Dear Representative Manford:

This is in answer to your request for an opinion as follows:

"I have had an inquiry for an opinion from your office relative to whether the state cigarette sales tax also applies to the sale and purchase of cigars."

You have now advised that you are only interested in Chapter 149, RSMo., as amended.

We enclose herewith Opinion No. 431 to Mrs. Frances Ferris, Supervisor, Cigarette Tax Division, September 15, 1966, which partly answers your question as to whether cigars are cigarettes for the purpose of taxation.

Section 149.010, S.B. No. 209, 74th General Assembly, which became effective on October 13, 1967, defines cigarettes as follows:

"(1) 'Cigarette', an item manufactured of paper and tobacco or of substitutes for tobacco and paper products and which is intended primarily for the use by consumer or user of smoking by mouth and which is commonly classified, labeled or advertised as a cigarette;"



Honorable Donald L. Manford

It is therefore the opinion of this office that cigars are not cigarettes within the purview of Chapter 149, RSMo., 1959, as amended, for the purpose of taxation.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

AB:fb

Enclosure

OLDER AMERICANS ACT: /  
FEDERAL AND STATE AGREEMENTS:

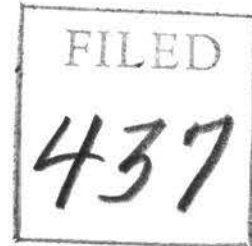
*Community Affairs, Dept.*

Certification of State Plan for  
Effective Services to Older Mis-  
sourian--Community Affairs.

OPINION NO. 437 - Answered by Lett-  
er (DeFeo)

November 16, 1967

Mr. Joseph M. Rowley, Director  
Department of Community Affairs  
State of Missouri  
501 Jefferson Building  
Jefferson City, Missouri 65101



Dear Mr. Rowley:

At your request we have reviewed the State Plan for Effective Services to the Older Missourian prepared pursuant to the Older Americans Act of 1965, as amended (PL 89-73 and PL 90-42.)

The substance of this Plan has been previously reviewed by this office when the designated state agency was the Office of State and Regional Planning and Community Development (Opinion Letter No. 434, August 25, 1966,) the only difference in the present Plan being the changing of names necessitated by the re-designation of the State Agency. House Bill No. 129, of the 74th General Assembly created the Department of Community Affairs. House Bill No. 128 and House Bill No. 129, transferred the functions of the office of the State and Regional Planning and Community Development to the Department of Community Affairs.

Section 7, of House Bill No. 129, provides as follows:

"The Department shall be responsible for the implementation of the Older Americans Act in Missouri. This agency shall develop the State Plan describing a program for carrying out the Older Americans Act and shall be the sole agency responsible for coordinating all state programs related to the implementation of such Plan."

Based on the foregoing, it is our opinion that the Department of Community Affairs has been designated as the sole state agency responsible for administering the state plan and the Department has the authority to submit the state plan and to carry out the program therein, and that nothing in the state plan is inconsistent with the provisions of State Law.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

Louis C. DeFeo, Jr.  
Assistant Attorney General

LCD:fms

SCHOOLS:

BIDS:

CONSTRUCTION CONTRACTS:

PREVAILING WAGE LAW:

1. A school district authorizing construction of facilities which may exceed an expenditure of twenty five hundred dollars shall publicly advertise for bids on the construction; 2. After advertising for bids, the board in the exercise of sound discretion may reject any and all bids and may proceed with the construction under its own supervision and control without contracting.

OPINION NO. 441-67

December 12, 1967



Honorable Jack Curtis  
State Senator - 30th District  
750 North Jefferson  
Springfield, Missouri 65802

Dear Senator Curtis:

This official opinion is issued in response to your request for a ruling. You posed three questions regarding public school boards of education as follows:

"1. Does a board of education have authority to carry on a school building program whatever cost may be involved, without issuing a formal contract for the construction of the building improvements?

"2. Is the attached Attorney General's opinion, dated February 20, 1952, addressed to Commissioner of Education, State of Missouri, still a valid statement of the law, to the effect that a school board is authorized to construct school buildings without entering into formal contracts and that a school board may make direct purchases of materials needed and employ necessary labor to do the work directly, and is the new Section 177.086, passed in 1965, to be construed in Mo. 1949, was construed in that opinion?

"3. Assuming that the law still permits a school board to construct school facilities by hiring its own superintendent, workmen, and purchasing its own materials directly, without entering into any formal construction contract, does Section 290.250, R.S. Mo. 1959, require the school board, in such a case, to give any notification to the

Honorable Jack Curtis

Department of Industrial Relations or does the school board need to comply in any other respects with the prevailing wage statutes of Missouri?"

Since your first and second inquiries revolve around Section 177.086, RSMo Supp. 1965, we shall for convenience quote it here in full.

"1. Any school district authorizing the construction of facilities which may exceed an expenditure of two thousand five hundred dollars shall publicly advertise, for two successive weeks, in a newspaper of general publication, located within the county in which said school district is located, or if there be no such newspaper, in a newspaper of general publication in an adjoining county for bids on said construction.

"2. No bids shall be entertained by the school district which are not made in accordance with the specifications furnished by them and all contracts shall be let to the lowest responsible bidder complying with the terms of the letting, provided that the said school district shall have the right to reject any and all bids.

"3. All bids must be submitted sealed and in writing, to be opened publicly at time and place of the district's choosing."

We note that a separate statute on the same subject is applicable to metropolitan school districts only, namely, Section 177.161, RSMo Supp. 1965. The discussion here shall relate only to districts other than metropolitan school districts.

A brief discussion of the history of Section 8.250, RSMo 1959, will aid us in the construction of Section 177.086, supra.

Section 8.250, RSMo 1949 (Laws 1909, page 346) provided:

"No contract shall be made by an officer of this State . . . having the expenditure of public funds . . . for the erection or construction of any building, improvement, alteration or repair the total cost of which shall exceed the sum of ten thousand dollars, until publicly bids therefor are requested \* \* \*."

Honorable Jack Curtis

This office construed Section 8.250, RSMo 1949, to apply to public school districts. (Opinion No. 70, Phillips, 6/30/50; Opinion No. 37, Hamilton, 5/11/53 which opinions have been withdrawn because of subsequent changes in the statute.)

This office further construed Section 8.250, RSMo 1949, as not requiring public school boards of education to enter into formal contracts for construction. We held that a board of education (other than the City of St. Louis) has the authority to construct buildings by direct purchase of materials and direct employment of necessary labor without entering into construction contracts, to wit, Opinion No. 96, Wheeler, 2/20/52 (copy enclosed).

In 1957 Section 8.250 was repealed and reenacted (Laws 1957, page 726) to read as follows:

"No officer or agency of this state or of any city containing 500,000 inhabitants or over shall make any contract for the expenditure of moneys appropriated by the state in whole or in part or raised in whole or in part by taxation for the erection or construction of any building, improvement, alteration or repair if the total cost exceeds ten thousand dollars until public bids therefor are requested and solicited \* \* \* "

This office in construing Section 8.250, as amended, has held that boards of education of school districts are not within the meaning of the phrase "officer or agency of the state". Thus, Section 8.250, RSMo 1959, does not apply to school districts, Opinion No. 139, Wheeler, 8/20/62 (copy enclosed).

With this historical background we now turn to answering your present inquiries.

In Opinion No. 96 (1952), supra, we discussed at length the opinions of several courts which held that a statute requiring public contracts to be awarded on the basis of bids does not require the public body to perform all construction through a contractor. Such a statute does not deprive the public body from effecting its building program under its own supervision and control. Section 177.086, expressly authorizes a school district to reject any and all bids.

Although Section 8.250, RSMo 1959, construed in Opinion No. 96, (1952), supra, no longer applies to school boards, the reasoning of that opinion has direct application to the present statute



Honorable Jack Curtis

(Section 177.086) which governs bid requirements on construction by public school districts.

We are of the opinion that Section 177.086, does not require a school board to contract for construction but that the board may carry out its own building program under its own supervision and control.

There is one significant difference between Section 177.086 and Section 8.250 which should be noted. Section 8.250, provides that no contract in excess of a certain amount shall be made without soliciting bids. Section 177.086, however, provides that no school district shall authorize construction in excess of a certain amount without advertising for bids. Section 177.086, requires school districts to advertise for bids whenever they authorize construction regardless of whether or not the construction is ultimately performed directly by the school district or by contract.

Subsection 2 of Section 177.086, provides that the school district "shall have the right to reject any and all bids". Therefore after advertising for bids, the school board, in the exercise of sound discretion, may reject all bids and undertake the construction itself without contracting.

Your last inquiry relates to applicability of the prevailing wage law of this State. This office has held that the prevailing wage law, Section 290.210 et seq., RSMo, applies to and includes school districts. See Opinion No. 33, Gladden, 1/23/58 (copy enclosed). However, we have further held that the prevailing wage law does not apply to direct employees of public school districts. Opinion No. 77, Rose, 7/18/61 (copy enclosed). Also see: State ex rel City of Joplin vs. Industrial Commission of Missouri, Mo., 329 S.W.2d 687. Opinion No. 77 is directly responsive to your present inquiry.

#### CONCLUSION

Therefore, it is the opinion of this office that Section 177.086, RSMo Supp. 1965, applicable to all school districts except metropolitan districts requires that:

1. A school district authorizing construction of facilities which may exceed an expenditure of twenty-five hundred dollars shall publicly advertise for bids on the construction;

Honorable Jack Curtis

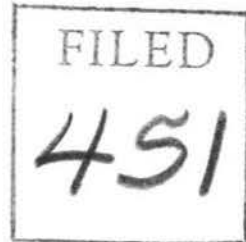
2. After advertising for bids, the board in the exercise of sound discretion may reject any and all bids and may proceed with the construction under its own supervision and control without contracting.

The foregoing opinion which I hereby approve was prepared by my assistant, Louis C. DeFeo, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

Enclosures (4)    Opinion No. 96, Wheeler, 2/20/52  
                         Opinion No. 139, Wheeler, 8/20/62  
                         Opinion No. 33, Gladden, 1/23/58  
                         Opinion No. 77, Rose, 7/18/61



December 6, 1967

OPINION NO. 451  
(Answered by Letter - Duff)

Mr. Clyde Burch  
General Counsel  
Northeast Missouri State  
Teachers College  
Kirksville, Missouri 63501

Dear Mr. Burch:

This opinion is in response to your letter of November 24, 1967, in which you ask whether the Board of Regents of Northeast Missouri State Teachers College has the authority to delete the word "Teachers" from the name of the college and from the title of the board.

The Board of Regents of Northeast Missouri State Teachers College has the power to change the name of this institution to Northeast Missouri State College, and the name of the board of regents to the Board of Regents for the Northeast Missouri State College. Section 174.030, RSMo 1959, expressly authorizes the board of regents to eliminate the word "Teachers" from the name of the institution and to eliminate the word "Teachers" from the name of the board.

"The board of regents of each state teachers college shall have power in its discretion to change the name of its college as provided by section 174.020 by eliminating therefrom the word 'teachers', and to change the name of said board as provided by section 174.040 by eliminating therefrom the word 'teachers'; and thereafter said colleges and said boards shall have and enjoy the same rights and privileges as are granted to teachers colleges by law, but nothing herein contained shall be construed to grant authority to confer post graduate degrees except such degrees as may be necessary to the training

Mr. Clyde Burch

of teachers for the free public schools of the state or degrees other than those in education and arts and sciences, nor does it grant additional powers or authorities to said colleges or to said boards not enjoyed by other colleges or boards whose names are not changed." Section 174.030, RSMo 1959.

Section 174.030 refers to Section 174.040 therefore, the board of regents under the name of the Board of Regents for the Northeast Missouri State College would have all the powers granted by Section 174.040.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

DD:1ch

OFFICERS:

ELECTION COMMISSIONERS:

Board of Election Commissioners of  
Jackson County not entitled to increase  
in salary under House Bill 398(Section  
113.690) during their present term.

OPINION NO. 453

December 28, 1967

Honorable Wm. F. (Bill) Moore  
State Representative  
Third District - Jackson County  
4320 Bell  
Kansas City, Missouri 64111



Dear Representative Moore:

On November 21, 1967, at suggestion of the Jackson County Board of Election Commissioners, you submitted a request for an official opinion from this office as follows:

"On October 13, 1967, House Bill #398 became effective. This bill includes salary adjustments for the employees and a raise from \$3,600 to the \$5,200 for each of the board members of the Jackson County Election Board. The board members terms expired in April, 1970.

"Attached herewith are copies of letters from the Jackson County Court, the funding institution, indicating that the funds are available to pay the necessary increases.

"We are therefore requesting an opinion as the propriety of accepting the increase as approved by the 1967 Legislature, during our present term of office as board members.

"We would direct your attention to House Bill #111, which requires substantial additional duties upon the board members to take the registration to the individual homes and to additional places as requested by citizens other than the Election Board Office. We thank you for your assistance."

Honorable Wm. F. (Bill) Moore

In substance, the question submitted is whether the increase in compensation provided for in House Bill 398, 74th General Assembly, to the Members of the Jackson County Board of Election Commissioners, is due them during the present term of office.

House Bill 398, repeals Section 118.120, 113.620 and 113.690, RSMo 1959, and by amendment reenacted three new sections to be known by the same section numbers. Only Sections 113.620 and 113.690, apply to Jackson County.

The only change made in Section 113.620, by amendment, was the increase in compensation of two clerks that have charge of establishing precincts and voting places and other duties provided in such statute. This section is not material to the question at issue.

Section 113.690, as amended, increases the salary of each member of the board of election commissioners from \$3,600 to \$5,200 per year. It also increases the compensation to be paid the clerks and other employees appointed by the board. However, the increase of compensation to the clerks is not material to the question now under consideration. This statute does not provide that the increase in compensation is to provide additional compensation for additional duties imposed.

Section 113.670, which applies to Jackson County, was repealed and reenacted by House Bill No. 111, 74th General Assembly. The only change made in this section was as follows:

"6. Upon receipt of written requests from applicants who are otherwise entitled to vote but who are physically incapacitated and unable to go to places of registration, the board shall send two registration officers to the homes of such applicants. The registration officers must be of opposite political parties. The validity of each request shall be determined by the board. The board may establish rules and regulations as it may deem necessary in order to give effect to this section."

Under this amendment, when a voter wants to register and is physically incapacitated and unable to go to the regular place of registration, the board of election commissioners is to send two registration clerks to his home to accept his registration.



Honorable Wm. F. (Bill) Moore

Section 113.550 RSMo, which applies to Jackson County, provides for a board of election commissioners of four members to be appointed by the governor with the advice and consent of the senate, who shall hold their office for a term of four years and until their successors are commissioned and qualified.

The Members of the Board of Election Commissioners of Jackson County are public officers. *Mooney v. County of St. Louis*, *infra*.

Article VII, Section 13 of the Missouri Constitution provides:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

In *Mooney v. County of St. Louis*, 286 S.W.2d 763, the question before the court was the effect of the statute increasing the compensation of Members of the Board of Election Commissioners of the County of St. Louis. In holding they were not entitled to the increase in compensation during the term of office, the court stated, *l.c.* 766:

"[4] There can be no doubt but that the legislature may award extra compensation to an incumbent for the performance of certain newly imposed duties without violating the constitutional inhibition under consideration. *State ex rel. McGrath v. Walker*, 97 Mo. 162, 10 S.W. 473; *State ex rel. Harvey v. Sheehan*, 269 Mo. 421, 190 S.W. 864; *Denneny v. Silvey*, 302 Mo. 665, 259 S.W. 422; *Little River Drainage Dist. v. Lassater*, 325 Mo. 493, 29 S.W.2d 716. 'Although new duties germane to an office are imposed on an officer, the compensation cannot be increased without violating the prohibition against an increase in compensation after election or appointment, or during the term of office. \* \* \* However, such a provision does not prevent the legislature \* \* \* from providing that a change in the duties of an incumbent of an office shall be accompanied by \* \* \* an increase \* \* \* of compensation where the duties added \* \* \* are extrinsic or foreign to the office and not incidental or germane thereto.' 67 C.J.S., Officers, §95g.

"[5,6] The burden was on the plaintiffs to show that the increase in salary provided in S.B. 254 was intended by the General Assembly

Honorable Wm. F. (Bill) Moore

as compensation for the additional duties required by S.B. 237.

"In the instant case there was no statement in either S.B. 25<sup>4</sup> or S.B. 237 to the effect that the increase in salary was to compensate for added duties. Neither bill referred to the other. \* \* \* "

As heretofore stated, the statutes do not provide that the increase in compensation is for any additional duties required by statute to be rendered by said officers. To hold that the increase in compensation for said officials is due them during their present term would be in conflict with Article VII, Section 13, of the Missouri Constitution, supra.

#### CONCLUSION

Therefore, it is the opinion of this office that the increase in compensation provided for in House Bill No. 398, 74th General Assembly, cannot be paid the Members of the Board of Election Commissioners of Jackson County during their present terms of office.

The foregoing opinion, which I hereby approve, was prepared by my assistant Moody Mansur.

Yours very truly,

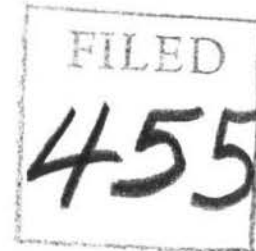


NORMAN H. ANDERSON  
Attorney General

Opinion No. 455  
Answered by Letter (Ashby)

December 27, 1967

Honorable Robert D. Scharz  
Superintendent  
Division of Insurance  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. Scharz:

This letter is written to respond to your question, whether the contract entered into by the Nation-Wide Auto Coverage Corporation constitutes the engaging in the business of insurance.

This office, at an earlier date, wrote an opinion involving almost an identical policy as that issued by the Nation-Wide Auto Coverage Corporation. This opinion, No. 286, dated September 5, 1967, addressed to you, holds that such a policy which agrees for a specified annual payment to reimburse or furnish, wholly or partially, to its contract holders, financial responsibility bonds, accident travel expenses, legal expenses, emergency road service, towing, and tire-changing, arising from the operation of motor vehicle, is engaging in the insurance business. This opinion is attached.

Comparison of the policy issued by Nation-Wide Auto Coverage Corporation with that of the Allied Auto Acceptance Corporation, which is the subject of Opinion 286, establishes that these policies are virtually identical, word-for-word, paragraph-by-paragraph.

Utilizing the reasoning applied in Opinion 286, we conclude that the contract published by the Nation-Wide Auto Coverage Corporation is a contract of insurance and that such corporation is engaging in the insurance business.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

Enclosure: Opinion 286, Scharz,  
9/5/67.